DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1042
Title: Tammy Foret Freeman, et al., Petitioners
v.
Quicken Loans, Inc.
Docketed: February 18, 2011
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (09-30902)
Decision Date: November 17, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 15 2011	Petition for a writ of certiorari filed. (Response due March 21, 2011)
Mar 7 2011	Order extending time to file response to petition to and including April 11, 2011.
Apr 11 2011	Brief of respondent Quicken Loans, Inc. in opposition filed.
Apr 26 2011	DISTRIBUTED for Conference of May 12, 2011.
Apr 26 2011	Reply of petitioners Tammy Foret Freeman, et vir filed. (Distributed)
May 16 2011	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 25 2011	Brief amicus curiae of United States filed.
Sep 14 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	Petition GRANTED.
Oct 18 2011	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Oct 20 2011	Record received from U.S.D.C. for Eastern District of Louisiana. (1 box)
Nov 4 2011	Consent to the filing of amicus curiae briefs in support of either party received from counsel for the petitioner.
Nov 10 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 16 2011	Extension of time to file respondent's brief on the merits to and including January 3, 2012.
Nov 25 2011	Joint appendix filed. (Statement of costs received.)
Nov 25 2011	Brief of petitioners Tammy Foret Freeman, et vir filed.
Dec 2 2011	Brief amicus curiae of United States filed.
Dec 2 2011	Brief amici curiae of California, et al. filed.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, February 21, 2012
Dec 21 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Jan 3 2012	CIRCULATED.
Jan 3 2012	Brief of respondent Quicken Loans, Inc. filed. (Distributed)
Jan 10 2012	Brief amicus curiae of Association of Realtors filed. (Distributed)
Jan 10 2012	Brief amici curiae of American Escrow Association, et al. filed. (Distributed)
Jan 10 2012	Brief amici curiae of American Bankers Association, et al. filed. (Distributed)
Jan 23 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 31 2012	Reply of petitioners Tammy Foret Freeman, et vir filed. (Distributed)
Feb 21 2012	Argued. For petitioners: Kevin K. Russell, Washington, D. C.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Thomas M. Hefferon, Washington, D. C.
May 24 2012	Adjudged to be AFFIRMED. Scalia, J., delivered the opinion for a unanimous Court.

PETITION FOR WRIT OF CERTIORARI

FILED

RECORDS AND BRIEFS

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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

TAMMY FORET FREEMAN et al.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

In this case, the Fifth Circuit joined the Fourth, Seventh, and Eighth Circuits in ruling that this provision prohibits the acceptance of unearned fees only when those fees are divided with a culpable third party, as in a kickback arrangement. It acknowledged, however, that the Third, Second, and Eleventh Circuits, as well as the Department of Housing and Urban Development, have taken the contrary view that the provision also applies to unearned fees retained by a single defendant. The question presented is:

Whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioners here, and plaintiffs-appellants below, Tammy Foret Freeman and Larry Scott Freeman; Paul Smith and Irma Smith; and John J. Bennett, III, and Stacey B. Bennett, on behalf of themselves and a class of similarly situated persons.

Quicken Loans, Inc. is the sole respondent here, and was the defendant-appellee below.

Title Source, Inc., was a defendant in the district court. Although Title Source prevailed in the district court, and although petitioners did not pursue their claims against Title Source on appeal, the caption of the court of appeals' decision lists Title Source as a defendant-appellee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tammy Foret Freeman *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 626 F.3d 799. The district court's opinion (Pet. App. 19a-70a) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 17, 2010. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 8 of the Real Estate Settlement Procedures Act, Pub. L. No. 93-533 (1974), codified at 12 U.S.C. § 2607, provides in relevant part:

> **Prohibition against kickbacks and unearned fees**
>
> (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection

with a transaction involving a federally related mortgage loan other than for services actually performed.

STATEMENT OF THE CASE

Petitioners obtained residential mortgages from respondent Quicken Loans. At closing, Quicken charged petitioners a "loan discount fee," but it did not give them any loan discount. Petitioners filed suit, alleging that respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), by imposing an unearned fee. The Fifth Circuit, however, held that even if Quicken did nothing to earn the fee, it did not violate the statute because in its view, RESPA "prohibits only kickbacks and referral fees." Pet. App. 15a. The court acknowledged that its decision expanded an existing three-to-three circuit conflict over whether RESPA "requires two culpable parties, a giver and a receiver of the unlawful fee." Pet. App. 6a.

I. Statutory And Regulatory Framework

A. Real Estate Settlement Procedures Act

In 1974 Congress passed the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, in response to the "unnecessarily high settlement charges caused by certain abusive practices" in the real estate settlement industry. *Id.* § 2601(a). The statute addresses these abuses through a series of interrelated provisions. One section of the statute imposes disclosure requirements that force mortgage service providers to itemize their bills so that consumers can see what services they are receiving for their money and make informed decisions. *Id.*

§ 2603. The statute thus requires settlement service providers to "clearly itemize all charges imposed upon the borrower . . . in connection with the settlement," using a form developed by HUD. *Id.* The standard settlement form developed by HUD, in turn, requires the disclosure of any "charge (points) for the specific interest rate chosen." DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OMB APPROVAL NO. 2502-0265, SETTLEMENT STATEMENT (HUD-1) ¶ 802 (2010).[1]

Section 8 of the statute complements the disclosure requirements. Entitled "Prohibition against kickbacks and unearned fees," the provision has two subsections. 12 U.S.C. § 2607. The first expressly prohibits kickbacks:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Id. § 2607(a). Subsection (b) then addresses unearned fees:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally

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[1] *Available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf.

> related mortgage loan other than for services actually performed.

Id. § 2607(b).

B. Administrative Regulations And Policy Statements

Congress directed the Secretary of Housing and Urban Development (HUD) "to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of this [statute]." 12 U.S.C. § 2617(a).[2] HUD issued an initial set of regulations in 1974, which it revised in 1992, after notice and comment, to address, among other questions, the scope of Section 8. After quoting the text of Section 8(b), the regulations provided:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.

24 C.F.R. § 3500.14(c).

In 2001, the Seventh Circuit concluded that the statute was most naturally read to extend only to kickbacks, and that the regulation did not clearly provide otherwise. *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). In response, HUD

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[2] The Secretary also was required to "prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services." 12 U.S.C. § 2604(a).

issued a Statement of Policy, explaining the agency's view that:

> Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.[3]

In the years since it issued its Statement of Policy, HUD has consistently repeated and defended its interpretation of the statute in *amicus* briefs before the federal courts of appeals.[4]

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[3] *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53,052, 53,058 (Oct. 18, 2001).

[4] *See* Br. for the United States as *Amicus Curiae* Supporting Reversal, *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002) (No. 01-2318), 2002 WL 32351432; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (No. 02-2285), 2002 WL 32115107; Br. for the United States as *Amicus Curiae* Supporting Affirmance, *Haug v. Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003) (No. 02-2458), 2002 WL 32144590; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th Cir. 2003) (No. 02-13930-DD), 2002 WL 32366238; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49 (2d Cir. 2004) (No. 03-7665), 2003 WL 24072306; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d Cir. 2005) (No. 03-4273), 2004 WL 3759909.

II. Factual Background

The Freemans, Bennetts, and Smiths all secured mortgages in Louisiana from Quicken Loans. Quicken charged the Freemans $980, and the Bennetts $1100, for a "loan discount fee" at the closing on their mortgages. Pet. App. 21a n.3, 22a n.6. In industry parlance, a "loan discount fee" is money borrowers pay to purchase "points" which reduce their interest rate. As Quicken's website explains, "[p]urchase points, also known as 'buy-down' or 'discount points,' are an up-front fee paid to the lender at closing to buy-down or lower your interest rate over the life of the loan."[5] In this case however, Quicken charged the loan discount fee but did not provide petitioners any reduction in their interest rate. Pet. App. 2a.

The Smiths were charged a $575.00 "loan processing fee" and a duplicative $5,107.44 "loan origination" fee, Pet. App. 22a n.4, although Quicken later claimed that "the loan origination" fee was, in fact, a mislabeled "loan discount fee" like the one imposed on the Freemans and Bennetts, Pet. App. 2a-3a. However labeled, the Smiths received no loan discount or any other service in exchange for the fee. *Id.*

III. Procedural History

1. On February 19, 2008, the Freemans filed suit in state court against Quicken, alleging, as relevant

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[5] Quicken Loans Website, Mortgage Closing Costs and Fees, *available at* https://www.quickenloans.com/home-buying/learn/why/mortgage-closing-costs-and-fees.

here, violations of Section 8(b) of RESPA. Pet. App. 20a.[6] Quicken removed the case to federal court, where it was consolidated with a nearly identical suit filed by the Smiths and a putative class action filed by the Bennetts. Pet. App. 21a-22a.

Quicken moved for summary judgment, arguing, among other points, that even if it had not provided petitioners anything in exchange for the challenged fees, it had not violated Section 8 because it had retained the unearned fees itself rather than dividing them with a third party. Pet. App. 23a-24a. Quicken insisted that Section 8(b) is a narrow prohibition against kickbacks and similar fee-splitting, not a general prohibition against charging unearned fees. *Id.*

The district court agreed. It recognized that "several circuit courts have split on the issue of whether Section 8(b) provides a claim in a situation where a *single* settlement services provider retains unearned fees." Pet. App. 43a. The circuit split was further "complicat[ed]," it said, by the Statement of Policy from the Department of Housing and Urban Development construing Section 8(b) as forbidding unearned charges "whether the entire charge is divided or split among more than one person or entity

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[6] Petitioners also brought claims against the title company that conducted the closing, but those claims were ultimately dismissed, Pet. App. 70a, and petitioners do not challenge that dismissal here. Petitioners further brought state law claims premised upon the alleged RESPA violations. Pet. App. 3a, 14a & n.15. Those claims were dismissed along with petitioners' RESPA claims. Pet. App. 3a, 14a n.15.

or is retained by a single person." Pet. App. 43a-44a. After reviewing the Statement of Policy and the conflicting circuit court decisions, the district court found "the circuit decisions that have held Section 8(b) only applies to divided fees" more persuasive. Pet. App. 66a. And because it concluded that this result was required by the "plain language of Section 8(b)," it refused to defer to HUD's contrary interpretation. *Id.*

2. The Fifth Circuit affirmed. Like the district court, the Fifth Circuit acknowledged that the courts of appeals have taken "divergent positions," Pet. App. 7a, on the scope of Section 8(b) in two related contexts: "mark-ups and undivided unearned fees," Pet. App. 6a. A "markup," the court explained, occurs when "a service provider charges the borrower for services performed by a third party in excess of the cost of the services to the service provider but keeps the excess itself." Pet. App. 5a (citation omitted). An "undivided unearned fee" arises when, as in this case, "a service provider charges the borrower a fee for which no correlative service is performed." *Id.* (citation omitted).

The court of appeals explained that the "Fourth, Seventh, and Eighth Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision." Pet. App. 6a (citations omitted). Accordingly, these circuits hold that "RESPA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable." *Id.* Given this interpretation, these circuits "[p]resumably . . . would not find undivided unearned charges actionable" either. Pet. App. 6a-7a.

At the same time, the court recognized that the "Second, Third, and Eleventh Circuits have rejected the two-party requirement." Pet. App. 6a. All three circuits thus have "held that RESPA § 8(b) prohibits markups," and the Second Circuit has applied the same rule to undivided unearned fees as well. *Id.*

"With these divergent positions in mind," the Fifth Circuit "enter[ed] the interpretive fray," holding "that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees." Pet. App. 7a. Instead, "RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services." Pet. App. 15a.

First, the court examined the phrase "[n]o person shall give and no person shall accept." Pet. App. 7a. The "use of the conjunctive 'and,'" the court concluded, implies that "the provision requires two parties each committing an act," one giving and one accepting payment. *Id.* The Fifth Circuit found further support in the fact that the prior subsection, Section 8(a), used similar language while expressly prohibiting "kickbacks." Pet. App. 8a. "To be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well." *Id.*

Next, the court looked at the words "portion, split, or percentage," and found that "all three words require less than 100% or the whole of something." Pet. App. 8a-9a. The court acknowledged that "certain statutes use 'any portion' and 'any percentage' to include situations that involve the entirety of something." Pet. App. 9a (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 118-19 (2d Cir. 2007) (collecting examples)). But, invoking the canon of *noscitur a sociis*, the Fifth Circuit reasoned

that Congress intended a narrower interpretation of "percentage" and "portion" in this provision because it also included the word "split," which "requires dividing a single thing among several parties." Pet. App. 9a-10a.

Finally, the court rejected petitioners' argument that the court should defer to HUD's interpretation of the statute as encompassing more than kickbacks. Pet. App. 11a-14a. "Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law." Pet. App. 12a. The 2001 Statement of Policy, the court explained, "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion." Pet. App. 13a.[7]

3. Judge Higginbotham dissented. He explained (Pet. App. 15a) that he "would, in the main, take the path set forth in the Second Circuit's well-reasoned opinion in *Cohen*," 498 F.3d 111. In that case, the Second Circuit rejected the claim that Section 8(b) of RESPA was unambiguously limited to kickbacks. *Id.* at 113. The phrase "any portion, split, or percentage," the court concluded, could extend to

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[7] The court also noted that "Quicken cursorily contends that the loan discount fees are not settlement services, and therefore are not covered by the statute," but did not reach that question in light of its construction of Section 8(b). Pet. App. 4 n.1.

cases in which a defendant kept the entirety of an unearned charge for itself. *Id.* at 118-19.

The court in *Cohen* further rejected any reliance on the *noscitur a sociis* canon. "Whether or not any one noun" in the statutory phrase could be read to require a division of unearned fees, the Second Circuit explained, Congress's "use of the expansive modifier 'any' in conjunction with all three words" precluded the conclusion that the statute unambiguously applied only to kickbacks. *Id.* at 120. The court thus found that Section 8(b) could "plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured." *Id.* At the same time, the court concluded that this permissible interpretation was not compelled by the language of the statute, resulting in an ambiguity the court resolved by deferring to HUD's Statement of Policy. *Id.* at 124-26.

While Judge Higginbotham disagreed with the Second Circuit's decision to afford *Chevron* deference to HUD's Statement of Policy, Pet. App. 15a, he adopted the same interpretation of the statute. Prohibiting unearned fees, he explained, "strikes at a core objective of RESPA: promoting transparency of costs associated with settlement." Pet. App. 17a. Although "the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe that they are paying for something they are not." *Id.*

REASONS FOR GRANTING THE WRIT

Both the district court and the court of appeals in this case correctly recognized that the circuits are deeply divided over whether RESPA's prohibition of unearned fees merely prohibits kickbacks or also protects consumers from unearned fees that are not divided with a third party. The circuit conflict is long-standing, entrenched, and incapable of resolution except by this Court. The present division and uncertainty – regarding a law governing one of the most important financial transactions most Americans ever undertake – is intolerable for consumers, lenders, and settlement service providers alike. The Court's intervention, therefore, is required.

I. Certiorari Is Warranted To Resolve An Entrenched Circuit Conflict Over The Scope Of RESPA's Prohibition Against Unearned Fees.

The circuits are intractably divided over the scope of Section 8(b) of RESPA. The conflict has persisted for more than a decade and has only deepened over the years.

A. The Courts Of Appeals Are Divided Four to Three Over Whether RESPA Prohibits Only Kickbacks, Or Instead Reaches All Unearned Fees.

The circuit conflict arises in the context of two closely related types of charges, which the cases refer to as "markups" and "undivided unearned fees." Markups and undivided unearned fees are different from traditional kickbacks because the unearned

charge is retained by the defendant who imposed the charge and is not (as in a kickback arrangement) shared with a third party.[8] Relying on that difference, defendants maintain – and four circuits have held – that RESPA reaches only schemes in which an unearned fee is divided between two or more people. By contrast, three other circuits, and the Department of Housing and Urban Development, construe Section 8(b) to apply to all unearned fees, whether divided or not.

1. The Fourth, Fifth, Seventh, And Eighth Circuits Limit Section 8(b) To Kickbacks.

In this case, the Fifth Circuit joined the Fourth, Seventh, and Eighth Circuits in concluding that "read in its entirety, RESPA is an anti-kickback statute" and nothing more. Pet. App. 10a.

In *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002), the Fourth Circuit construed Section 8(b) to "only prohibit[] overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party." *Id.* at 265.

The Seventh Circuit reached the same conclusion in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). There, the court of appeals construed prior circuit precedent to "compel[]

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[8] Of course, in a markup case, a third party is involved (*e.g.*, the vendor who provided the service the defendant marked up). But the unearned fee remains undivided because the third party vendor does not receive any portion of the markup, having been paid only what it earned by providing actual services.

dismissal of [a plaintiff's] RESPA claims" unless the plaintiff alleges that "a third party . . . accept[ed] unearned fees" from the defendant. *Id.* at 627. It further rejected the plaintiff's claim that an intervening amendment to the RESPA regulations in 1992 had "eliminate[d] the need to plead facts suggesting that defendants split an unearned fee with a third party." *Id.* The Seventh Circuit subsequently reaffirmed its position that "section 8(b) is an anti-kickback provision," rejecting HUD's contrary interpretation in its 2001 Statement of Policy. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002); *see also Weizeorick v. ABN AMRO Mortg. Group, Inc.*, 337 F.3d 827, 830 (7th Cir. 2003) ("Our case law has consistently held that Section 8(b) is not violated unless the defendant splits a fee with a third party.").

The Eighth Circuit soon followed suit, holding that "Section 8(b) is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute." *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003).

2. The Second, Third, And Eleventh Circuits Agree With HUD That Section 8(b) Applies To All Unearned Fees.

The narrow construction of RESPA adopted by the Fifth Circuit has been considered and rejected by three other circuits and the agency Congress charged with administering the statute.

In *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003), the Eleventh Circuit read Section 8 to prohibit markups. It recognized that

other courts, including the district court in the case before it, had construed Section 8(b) to "requir[e] two culpable parties to split an unearned fee." *Id.* at 982 (citing decisions of the Fourth and Seventh Circuits). Nonetheless, the Eleventh Circuit determined that those courts' reasoning "does not withstand scrutiny." *Id.* The "assertion that the language 'no person shall give and no person shall accept' means that both a giver and an acceptor are required for a violation of subsection 8(b) rests on a misunderstanding of English grammar." *Id.* "The 'and' in subsection 8(b)," the court explained, "operates to create two separate prohibitions," not a requirement that an unearned fee must be split to be actionable. *Id.*[9]

The Third Circuit reached the same conclusion in *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005). The assertion "that Section 8(b) applies only to kickbacks," the court explained, "is belied by the use of the term 'kickback' in Section 8(a) and not in Section 8(b)." *Id.* at 389. Moreover, a reading of Section 8(b) that allows a cause of action for markups is consistent with the title of Section 8 that prohibits both kickbacks and unearned fees." *Id.* (citing 12 U.S.C. § 2607 (entitled "Prohibition against kickbacks and unearned fees")). And as a practical matter, the court noted, the economic harm to the consumer is the same whether the defendant retains an unearned charge for itself or passes it on as a kickback to a third party. *Id.* at 388-89.

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[9] The court ultimately affirmed the district court's dismissal on other grounds. *Id.* at 983-84.

The Second Circuit has likewise considered and rejected the claim that Section 8(b) is limited to kickbacks. *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004), surveyed the conflicting circuit precedent, and concluded that the "words of the statute do not seem to compel either reading." *Id.* at 58. The court resolved the ambiguity by deferring to HUD's interpretation of the statute as prohibiting unearned fees whether split with another party or not. *Id.* at 58-62. Three years later, the Second Circuit reaffirmed that conclusion, holding that a lender violated Section 8(b) by charging a consumer a $225 "post-closing fee" for which it performed no actual services. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 113 (2d Cir. 2007).

District courts in other circuits have adopted conflicting interpretations of Section 8(b). *Compare Bushbeck v. Chi. Title Ins. Co.*, 632 F. Supp. 2d 1036, 1042 (W.D. Wash. 2008) ("Relying on the reasoning in *Cohen*, the court determines that the Bushbecks need not have alleged a split of the unearned fee and allows the claim to proceed.") *and Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 605 (N.D. Cal. 2007) ("Section 8(b) prohibits mark-ups.") *with Morales v. Countrywide Home Loans, Inc.*, 531 F. Supp. 2d 1225, 1228 (C.D. Cal. 2008) ("While such repricing or mark-ups could be actionable for other reasons (e.g. fraud), it is not a violation of RESPA."); *Morrison v. Brookstone Mortg. Co., Inc.*, No. 2:03-CV-729, 2006 WL 2850522, at *7 (S.D. Ohio Sept. 29, 2006) (same); *and Welch v. Centex Home Equity Co., LLC*, 262 F. Supp. 2d 1263, 1270 (D. Kan. 2003) (same).

B. The Scope Of RESPA's Prohibition On Unearned Fees Is A Question Of Recurring Importance.

As the breadth and duration of the circuit conflict reflect, the scope of RESPA Section 8(b) is a frequently litigated question in the lower courts. *See supra* 13-16. This is not surprising, given the millions of real estate transactions that take place every year. *See* U.S. HOUSING MARKET CONDITIONS THIRD QUARTER 2010, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Nov. 2010) (more than four million homes sold during the third quarter of 2010 alone).[10] Whether RESPA narrowly prohibits only kickbacks or more broadly applies to unearned fees thus predictably determines the lawfulness of millions of dollars in fees imposed on homebuyers annually, affecting the cost – and perhaps even the volume – of transactions in one of the most important segments of the nation's economy.

The disparate application of RESPA undermines Congress's intent to establish uniform legal rules governing real estate closings "throughout the Nation." 12 U.S.C. § 2601(a). At present, the legal rules governing closing fees in South Carolina are irreconcilable with the rules applicable across the border in Georgia. Within the State of California, one set of rules applies in Los Angeles, and another in San Francisco. *Compare Morales v. Countrywide Home Loans, Inc.*, 531 F. Supp. 2d 1225, 1228 (C.D.

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[10] *Available at* http://www.huduser.org/portal/periodicals/ushmc/fall10/summary.pdf.

Cal. 2008) *with Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 605 (N.D. Cal. 2007).

Elsewhere, in the absence of binding precedent, customers, lenders, and title companies are left to guess as to what rules will ultimately be found to apply to them, unable to rely with confidence even on HUD's official Statement of Policy. As a result, national companies like Quicken are subject to conflicting rules and substantial uncertainty, while consumers enjoy uneven protections from a statute Congress enacted for the benefit of all Americans.

C. The Circuit Conflict Is Well Considered, Entrenched, And Incapable Of Resolution Except By This Court.

The time has come for this Court to intervene. The open disagreement among the circuits has now persisted for over a decade, growing only deeper and more intractable. Each court to decide the question has carefully considered the preceding cases, openly adopting or rejecting their reasoning.[11] Nine years ago, HUD attempted to resolve the growing conflict

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[11] *See Krzalic*, 314 F.3d at 877 (considering, but declining to follow, HUD's Policy Statement); *Boulware*, 291 F.3d at 266 (following Seventh Circuit precedent); *Haug*, 317 F.3d at 836 (following precedent from Fourth and Seventh Circuits); *Sosa*, 348 F.3d at 982-83 (describing, then rejecting, decisions from the Fourth and Seventh Circuits); *Kruse*, 383 F.3d at 57-58 (discussing, and disagreeing with, conflicting decisions of the Fourth, Seventh, Eighth, and Eleventh Circuits); *Cohen*, 498 F.3d at 119 (same); *Santiago*, 417 F.3d at 388 (describing and adopting the positions of the Eleventh Circuit and HUD Policy Statement, while expressly rejecting the views of the Fourth, Seventh, and Eighth Circuits).

by issuing its Statement of Policy. But that only prompted even greater division – four circuits now hold that RESPA's text is unambiguously restricted to kickbacks, two circuits read the text to unambiguously say precisely the opposite, and one has found the statute ambiguous and deferred to HUD.

In these circumstances, further percolation would be pointless. The question presented has been thoroughly ventilated and is now ripe for this Court's review.

II. The Decision Below Is Wrong.

Certiorari is also warranted because the decision below is wrong, conflicting with the text and purposes of RESPA, as well as the reasonable interpretation of the agency Congress charged with the statute's administration.

A. Both The Text And Purposes Of RESPA Establish That The Statute Applies To All Unearned Fees.

The plain text of Section 8(b) encompasses petitioners' claims. Quicken "accept[ed]" from petitioners a "portion, split, or percentage" (*i.e.*, one hundred percent) of a "charge made . . . for the rendering of a real estate settlement service" (*i.e.*, the loan discount fee) in a covered real estate settlement. 12 U.S.C. § 2607(b). The loan discount fee moreover was not for "services actually performed," *id.*, given that Quicken did not provide petitioners with any

discount on their interest rate or any other service in exchange for the fee.[12]

The only reason the Fifth Circuit gave for nonetheless dismissing petitioners' claim was the fact that Quicken retained the entirety of the unearned fee for itself, rather than splitting it with a third party. Pet. App. 7a. Thus, the court of appeals would have found a violation if Quicken had given even a penny of the unearned charges to petitioners' mortgage brokers. But contrary to the court of appeals' decision, nothing in the text or purposes of the statute gives that penny any legal significance.

1. The Fifth Circuit claimed that "[t]he definitions of all three words ['portion,' 'split,' and 'percentage'] require less than 100% or the whole of something." Pet. App. 9a. But one hundred percent is obviously a "percentage," and, as the Fifth Circuit

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[12] Quicken argued in its reply brief at summary judgment, Pet. App. 35a-36a, 64a, and "cursorily" in its brief to the Fifth Circuit, Pet. App. 4a n.1, that the loan discount fee was not a charge for a "settlement service" within the meaning of the statute. However, the courts below did not reach that assertion, assuming for the purpose of their decisions that the fee fell within the scope of RESPA. Pet. App. 4a n.1. The correctness of that assumption, accordingly, is not before this Court. In any event, even if Quicken has preserved the argument, it lacks merit. Congress included the "funding of loans" within the definition of "settlement services," 12 U.S.C. § 2602(3), and HUD requires disclosure of loan discount fees on the Uniform Settlement Statement Congress required it to issue to enforce the statute. *See* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OMB APPROVAL NO. 2502-0265, SETTLEMENT STATEMENT (HUD-1) (2010), *available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf; 12 U.S.C. § 2603(a).

admitted, the U.S. Code contains numerous uses of the phrases "any portion of" or "any percentage of" that plainly encompass (as the terms suggest) *any* portion or percentage, up to and including one hundred percent. *See* Pet. App. 9a; *see also Cohen*, 498 F.3d at 118-19 (collecting examples). By prohibiting defendants from accepting "*any* portion, split, or percentage" of its unearned charge, 12 U.S.C. § 2607(b) (emphasis added), Congress textually precluded the court of appeals' narrow construction of those terms. *See Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904) ("The word *any* excludes selection or distinction."); *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 (1995) (Thomas, J., dissenting) (finding it "difficult to imagine what broader terms Congress could have used" than the word "any").

The Fifth Circuit nonetheless relied on the *noscitur a sociis* canon to conclude that the phrase "portion, split, or percentage" could have no broader meaning than the word "split" standing alone. Pet. App. 9a-10a. But this Court has previously rejected that misuse of the canon, making clear that it does not require reducing a string of words to their least common denominator or ignoring the natural meaning of the individual statutory terms. *See, e.g.*, *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 379 (2006) (noting that a party's *noscitur* argument "seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage"); *Russell Motor Car Co. v. United States*, 261

U.S. 514, 519 (1923) ("That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association."); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 586 (1995) (Thomas, J., dissenting) ("*Noscitur a sociis*, however, does not require us to construe *every* term in a series narrowly because of the meaning given to just one of the terms."). Indeed, accepting the Fifth Circuit's construction would render the terms "portion" and "percentage" surplusage. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (holding that the lower court erred in "employ[ing] *noscitur a sociis* to give 'harm' essentially the same function as other words in the definition, thereby denying it independent meaning").

Second, the court of appeals concluded that by providing that "[n]o person shall give *and* no person shall accept" unearned fees, 12 U.S.C. § 2607(b) (emphasis added), "the provision requires two parties each committing an act." Pet. App. 7a-8a. But that inference is unsupported – a law providing that "no person shall advertise and no person shall maintain a gaming house" is most naturally understood to prohibit maintaining a gambling establishment, even if it is never advertised.[13]

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[13] In any event, markups and other unearned fees, no less than kickbacks, involve two parties – the defendant who imposes the charge and the consumer who pays it. Some courts have argued that "[i]t would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees." *Boulware*, 291 F.3d at 265

Third, the court of appeals believed the broader context of Section 8 as a whole supported its interpretation of Section 8(b) because Section 8(a) uses similar language while expressly proscribing kickbacks. Pet. App. 8a. "To be consistent with RESPA § 8(a)," the court reasoned, "RESPA § 8(b) should require two culpable actors as well." Pet. App. 8a. To the contrary, the statute's structure compels the opposite conclusion. Having expressly forbidden kickbacks in Section 8(a), Congress must have intended Section 8(b) to serve an independent function. That function is identified in the title of Section 8 – "Prohibition against kickbacks *and* unearned fees" (emphasis added).[14] Section 8(a) expressly prohibits "kickbacks," leaving "unearned fees" to Section 8(b). The Fifth Circuit's contrary conclusion renders Section 8(b) largely surplusage.

2. The court of appeals likewise failed in its efforts to square its narrow interpretation of the text with the basic purposes of the statute. Pet. App. 10a-11a.

In enacting RESPA, Congress sought to "reform[]" the real estate settlement process so as to "protect[] [consumers] from unnecessarily high

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But, as the Eleventh Circuit has explained, "a consumer could not be liable as the giver of an unearned portion of a fee because a consumer will always intend to pay the fee for services that are actually rendered." *Sosa*, 348 F.3d at 982.

[14] The subtitle of Section 8(b) in the U.S. Code – "Splitting charges" – was not included in the bill passed by Congress, but rather added during the statute's codification. *See Cohen*, 498 F.3d at 121 n.7. Accordingly, the subtitle sheds no light on the meaning of the provision.

settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). To be sure, one such practice was kickbacks, *id.* § 2601(b)(2), but charging fees for services never actually performed is a deceitful, "abusive practice[]" as well, one that – as this case demonstrates – also dramatically increases settlement costs. Nor did the court of appeals even attempt to explain why Congress would intend to subject a defendant to a fine and imprisonment for splitting a $25 unearned charge, yet leave entirely unregulated a $1,000 charge for a service never provided, so long as the defendant keeps all the money for itself.

Forbidding lenders and settlement companies from padding their bills with phony line item charges also directly furthers the Act's central aim of promoting "more effective advance disclosure to home buyers and sellers of settlement costs." 12 U.S.C. § 2601(b)(1). To that end, the Act required HUD to develop, and settlement companies to use, a uniform settlement statement that "conspicuously and clearly itemize[s] all charges imposed upon the borrower." *Id.* § 2603(a). Such disclosure facilitates comparison shopping and, thus, price competition among banks and settlement companies. Section 8(b), in turn, ensures the accuracy of the disclosures by requiring that the amounts listed on the disclosure form correspond to services actually provided.

B. Any Ambiguity Should Be Resolved By Deferring To HUD's Reasonable Construction Of The Statute.

The court of appeals further erred in disregarding HUD's authoritative construction of the statute. *See* Pet. App. 11a-14a.

1. "When Congress has 'explicitly left a gap for an agency to fill,'" the agency's resolution of the statutory ambiguity "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). This *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27.

When it enacted RESPA, Congress authorized HUD "to prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of" the statute. 12 U.S.C. § 2617(a). Since 1976, HUD has consistently exercised its delegated lawmaking authority to construe RESPA to forbid all unearned fees, without qualification. Within two years of the statute's enactment, and contemporaneous with the promulgation of the initial RESPA regulations, HUD issued the first edition of its RESPA consumer information booklet, as required by Congress. 12 U.S.C. § 2604(a). The booklet explained that it is "illegal to charge or accept a fee or part of a fee where

no service has actually been performed." 41 Fed. Reg. 20,280, 20,289 (May 17, 1976). The booklet said nothing to limit this rule to kickbacks or split fees.

In 1992, HUD undertook a revision of its RESPA regulations. Consistent with its original construction of the Act, the revised notice-and-comment regulations created a broad, unqualified rule that by its terms encompassed all forms of unearned fees, whether divided or not: "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [RESPA Section 8(b)]." 57 Fed. Reg. 49,600, 49,611 (Nov. 2, 1992) (amending 24 C.F.R. § 3500.14(c)).

In a 1996 proposed rulemaking addressing another section of RESPA, HUD reiterated that "no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed" and noted that "two persons are not required for [Section 8(b)] to be violated." 61 Fed. Reg. 29,238, 29,249 (June 7, 1996).

Despite HUD's repeated determination and categorical pronouncements that Section 8(b) prohibits all unearned charges, in 2001 the Seventh Circuit decided that HUD's position was ambiguous as to whether Section 8(b) extended beyond kickbacks. *Echevarria v. Chi. Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001). HUD responded by invoking its delegated lawmaking authority under 12 U.S.C. § 2617(a) to issue its Statement of Policy 2001-1 as "a formal pronouncement of its interpretation of the relevant statutory and regulatory provisions." 66 Fed. Reg. 53,052 (2001). HUD explained that in its view, "Section 8(b) forbids the paying or accepting of

any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person." *Id.* at 53,058. HUD has subsequently repeated that position in numerous *amicus* briefs filed in the courts of appeals. *See supra* 5 n.4.

2. The Fifth Circuit did not dispute that Quicken's charges in this case would violate RESPA as construed by HUD in its 2001 Statement of Policy. Instead, it declined to defer to HUD's considered interpretation on the ground that it was not issued pursuant to notice-and-comment rulemaking and "there is no indication that the HUD statement carries the force of law." Pet. App. 12a. But the fact that an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *see also Mead*, 533 U.S. at 231 ("[T]he want of [notice and comment] procedure[s] . . . does not decide the case."). And in this case, Congress expressly authorized HUD to exercise its lawmaking authority *either* through "rules and regulations" *or* through "such interpretations . . . as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a).

HUD's decision to exercise its delegated power through an interpretation rather than a rulemaking is thus within the scope of its statutory discretion. And under this Court's decisions, the resulting official interpretation of the statute is entitled to full *Chevron* deference. First, there can be no question

that HUD's interpretation is a product of the agency's demonstrated expertise regarding the mortgage loan market. *Cf. Barnhart*, 535 U.S. at 222 (explaining that "the related expertise of the Agency" is a relevant factor in deciding whether to defer under *Chevron*). In addition, the Statement reflects the "careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222; *see Kruse*, 383 F.3d at 61 (noting that the Statement was the "culmination of HUD's reflections on the meaning of section 8(b) . . . over a period of years"). As shown above, for the past thirty-five years HUD has repeatedly interpreted Section 8(b) to encompass violations by a single actor. By the time HUD issued its Statement of Policy in 2001, the correctness of its position had been examined by multiple courts, whose decisions the agency considered before reaffirming its view of the statute. *See* 66 Fed. Reg. at 53,053 (noting division on question among the courts); *id.* at 53,058 (discussing recent court cases).[15]

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[15] At the very least, the Statement of Policy's interpretation of HUD's RESPA regulations is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 462 (1997). *See* 66 Fed. Reg. at 53,057-59 (explaining that Policy Statement is an interpretation of 24 C.F.R. § 3500.14). And there should be no dispute that the notice-and-comment regulations, as interpreted by the agency, qualify for *Chevron* deference. *See Mead*, 533 U.S. at 230.

III. The Courts Of Appeals' Disagreement Over Whether HUD's Statement Of Policy Qualifies For *Chevron* Deference Provides An Additional Reason To Grant Review.

The dispute in this case over the deference owed to HUD's Statement of Policy presents this Court an opportunity to resolve a broader circuit conflict over the *Chevron* status of not only this particular policy statement, but also similar informal agency interpretations issued in a variety of settings.

1. Three courts of appeals – the Ninth, Eleventh, and Second Circuits – have held that HUD's Statement of Policy, although not issued pursuant to notice-and-comment rulemaking, qualifies for *Chevron* deference. *See Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d. 49, 61 (2d Cir. 2004) (giving *Chevron* deference to Statement's construction of Section 8(b)); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (same); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002) (giving *Chevron* deference to Statement's treatment of yield spread premiums); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1006 (9th Cir. 2002) (same).

On the other hand, the Fifth Circuit in this case rejected the Second Circuit's *Chevron* analysis, adopting instead the Seventh Circuit's view that HUD's Statement of Policy was too informal to carry the force of law. *See* Pet. App. 12a & n.10; *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002).

2. As Justice Scalia has observed, the circuit split over the deference due to this particular Statement of Policy reflects a broader "confusion in

the lower courts" regarding the appropriate level of deference owed informal agency interpretations in the aftermath of the Court's decision in *Mead*. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479 & n.* (2009) (Scalia, J., concurring).

"Following *Mead*," one court has explained, "the continuum of agency deference has been fraught with ambiguity . . . . Our decisions understandably have been conflicted as to whether *Chevron* deference applies in [various] situations." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1235 (9th Cir. 2005) (citations omitted); *see also Doe v. Leavitt*, 552 F.3d 75, 79 (1st Cir. 2009) ("In the aftermath of the Court's opinion in [*Mead*], the level of deference owing to informal agency interpretations is freighted with uncertainty."); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219-21 (2006) (discussing inconsistencies among courts of appeals);[16] Richard J.

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[16] *Compare Am. Wildlands v. Browner*, 260 F.3d 1192, 1998 (10th Cir. 2001) (granting *Chevron* deference to the EPA's interpretation of Clean Air Act as expressed in an approval of a state air quality plan) *with Hall v. EPA*, 273 F.3d 1146, 1155-56 (9th Cir. 2001) (denying *Chevron* deference to administrative decision to approve similar state plan); *compare Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1262 (9th Cir. 2001) (extending *Chevron* deference to the litigating positions of the Director of the Office of Workers' Compensation Programs interpreting the Longshore and Harbor Workers' Compensation Act) *with Day v. James Marine, Inc.*, 518 F.3d 411, 418 (6th Cir. 2008) (rejecting *Chevron* deference for the Director's litigating positions); *compare Am. Fed. of Govt. Employees, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 353-354 (D.C. Cir. 2007) (applying *Chevron* deference to informal adjudication by

Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. Supp. 2004) (calling the Court's precedents "confusing").

Indeed, courts do not even agree about the appropriate factors to consider in deciding whether to afford informal interpretations *Chevron* deference:

> Some courts concentrate on whether an interpretation binds more than the parties at hand; some broaden this analysis to ask whether, in addition to binding effect, the interpretation reflects public participation; some limit their focus to whether an agency interpretation reflects careful consideration; and some expand this focus, weighing careful consideration along with agency expertise and statutory complexity.

Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459 (2005).

Rather than leave the lower courts adrift, this Court should grant certiorari in this case to provide

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Department of Veterans Affairs) *with Am. Fed. of Govt. Employees, AFL-CIO, Local 2152 v. Principi*, 464 F.3d 1049, 1057 (9th Cir. 2006) (rejecting *Chevron* deference for a similar informal adjudication); *compare Gutnik v. Gonzales*, 469 F.3d 683, 689-93 (7th Cir. 2006) (deferring, under *Chevron*, to single-member decisions of the Board of Immigration Appeals) *with Rotimi v. Gonzales*, 473 F.3d 55, 57-58 (2d Cir. 2007) (declining to give *Chevron* deference to single-member decisions of the Board).

much-needed guidance on this important recurring question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

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Harvard Supreme Court Litigation Clinic

February 15, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30902

TAMMY FORET FREEMAN; LARRY SCOTT FREEMAN, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC.; TITLE SOURCE, INC., Defendants - Appellants

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PAUL SMITH; IRMA SMITH, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC; TITLE SOURCE, INC., Defendants - Appellees

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JOHN J. BENNETT, III; STACEY B. BENNETT, individually and on behalf of all others similarly situated, Plaintiffs - Appellants

v.

QUICKEN LOANS, INC; TITLE SOURCE, INC., Defendants - Appellees

On Appeal from the United States District Court for the Eastern District of Louisiana

FILED November 17, 2010

Before JONES, Chief Judge, and HIGGINBOTHAM, and ELROD, Circuit Judges

Edith H. Jones, Chief Judge:

This appeal concerns whether section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), prohibits lenders and others from charging "unearned, undivided" fees to borrowers at the closing of a mortgage transaction. The district court granted summary judgment to Quicken Loans, finding such charges permissible. We affirm, holding that RESPA § 8(b) requires that the challenged fee be split with another party in order to be actionable.

I. BACKGROUND

The Freemans, Bennetts, and Smiths each obtained a mortgage from Quicken Loans in 2007. At the closing of their mortgage transactions, Quicken charged the Freemans and Bennetts each a "loan discount fee" and charged the Smiths a "loan origination fee" as well as a "loan processing fee"—although Quicken contends the loan origination fee was misstated and was actually a loan discount fee similar to those charged to the Freemans and Bennetts. The Freemans and Bennetts contend that a loan discount fee may only be charged when there is a corresponding interest rate reduction and that otherwise it is an unearned fee for settlement services in violation of RESPA. As Quicken allegedly did not decrease the interest rate for either the Freemans' or Bennetts' loan, the couples argue the fee was unlawful. The Smiths allege that the loan origination fee was

duplicative of the loan processing fee, and thus an unearned fee for settlement services, or alternatively, that it was an unlawful loan discount fee akin to the fees charged to the Freemans and Bennetts.

Each couple filed suit separately in state court, seeking class treatment and alleging violations of RESPA and state law. Quicken removed the cases to federal court where they were consolidated. Quicken then moved for summary judgment, claiming that the couples' claims were not actionable under RESPA § 8(b) as the fees were not split with another party, and contending that as a result the state law claims failed. The district court agreed and granted summary judgment.

The couples appeal the district court's interpretation of RESPA. They concede their state law claims are contingent on the RESPA claim, but argue that because they should succeed on their RESPA claim, their state claims also survive.

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo applying the same standard as the district court. *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009). The court examines the evidence in the light most favorable to the nonmoving party, and summary judgment is appropriate if there is no genuine issue as to any material fact. *Id.* The essential facts are not disputed; on appeal the sole question is the interpretation of RESPA, which we review *de novo*.

III. DISCUSSION

The Appellants characterize Quicken's charges in the form of loan discount and loan origination fees as "undivided unearned" fees. RESPA § 8(b) states that:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). Appellants contend that the loan discount fees are charges for a real estate settlement service and that, as there was no interest rate reduction, the charges did not represent "services actually performed." Quicken counters that RESPA does not prohibit undivided unearned fees by a sole provider; to fall under the statute, fees must be divided between two parties such that they resemble a kickback or bribe.[1]

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[1] Alternatively, Quicken cursorily contends that the loan discount fees are not for settlement services, and therefore are not covered by the statute. *See Wooten v. Quicken Loans, Inc.*, No. 07-00478-CG-C, 2008 WL 687379, at *5 (S.D.Ala. Mar. 10, 2008) (exempting "the substantive terms of a loan" from the scope of "settlement services"). Our disposition of the case on the remaining language of RESPA § 8(b) makes it unnecessary to reach this argument.

A.

RESPA § 8(b) has been the subject of several lawsuits to determine its scope. Additionally, in 2001, HUD, the agency responsible for enforcing RESPA, issued a statement of policy that identified four types of overcharge schemes that this provision could potentially cover:

1. Fee splitting, where two or more persons split a fee, any portion of which is unearned;

2. Mark-ups, where a service provider charges the borrower for services performed by a third party in excess of the cost of the services to the service provider but keeps the excess itself;

3. Undivided unearned fees, where a service provider charges the borrower a fee for which no correlative service is performed; and

4. Overcharges, where a service provider charges a borrower for services actually performed but in excess of the service's reasonable value.

Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (Oct. 18, 2001). HUD proceeded to assert that RESPA § 8(b) prohibits all four types of transactions. *Id.* All circuits agree that the statute plainly prohibits fee splitting. *See, e.g., Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002). Similarly, every circuit addressing the issue has rejected the contention that simple

overcharges are actionable under the statute. *See Martinez v. Wells Fargo Home Mortgage Inc.*, 598 F.3d 549, 553-54 (9th Cir. 2010) (noting the Second, Third and Eleventh Circuits have all specifically held overcharges are not actionable and joining their conclusion); *Patino v. Lawyers Title Ins. Corp.*, No. 3:6-CV-1479-B, 2007 WL 4687748, at *3 (N.D. Tex. Jan. 11, 2007) (unpublished) (collecting cases).

The circuits disagree on the remaining two types of fees: mark-ups and undivided unearned fees. The Fourth,[2] Seventh,[3] and Eighth[4] Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision. Accordingly, RESPA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable. The Second,[5] Third,[6] and Eleventh[7] Circuits have rejected the two-party requirement and held that RESPA § 8(b) prohibits mark-ups. Only the Second Circuit has explicitly addressed whether RESPA § 8(b) prohibits a sole provider's undivided unearned charges and found that it did. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007).[8] Presumably, the

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[2] *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002).

[3] *Krzalic*, 314 F.3d at 879.

[4] *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003).

[5] *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004).

[6] *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005).

[7] *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003).

[8] The Third Circuit recently passed up an opportunity to evaluate whether a provider could charge fees for work it did not perform. *Tubbs v. N. Am. Title Agency, Inc.*, No. 09-2757, 2010

three circuits that require two culpable actors would not find undivided unearned charges actionable.

B.

With these divergent positions in mind, we enter the interpretive fray. "If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984).

We hold that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees. First, the language "No person shall give and no person shall accept" is not ambiguous as to whether a sole actor's undivided fees are covered. The term "and" normally means that both of the listed conditions must be satisfied. "The use of the conjunctive 'and' indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act." *Boulware*, 291 F.3d at 266. Thus, the provision requires two parties each committing an act: one party gives a "portion, split, or percentage," and another party receives a "portion, split, or percentage." *See id.* at 265 ("Therefore, § 8(b) only prohibits overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party."); *Mercado v. Calumet Federal Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985) ("The statute requires at least two parties to share fees."). This is not a prohibition on the undivided

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WL 3044067 (3d Cir. August 5, 2010) (unpublished). The dissent in *Tubbs* argued that remand was unnecessary, despite error by the district court, because the allegations failed to state a claim. *Id.* at *2 (Hardiman, J., dissenting).

fees of a sole provider like those charged to the Appellants.

Second, RESPA § 8(b) must be read in conjunction with its companion provision, RESPA § 8(a). RESPA § 8(a) uses language identical to RESPA § 8(b):

> *No person shall give and no person shall accept* any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a) (emphasis added). That "no person shall give and no person shall accept" a kickback clearly requires two culpable actors. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655 (1994); *see also National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501, 118 S. Ct. 927 (1998) (identifying "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"). To be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well.

Third, RESPA § 8(b)'s language "any portion, split or percentage" requires that two parties share something. *See Boulware*, 291 F.3d at 265 ("By using the language 'portion, split, or percentage,' Congress was clearly aiming at a sharing arrangement rather

than a unilateral overcharge."). The definitions of all three words require less than 100% or the whole of something. Webster's defines "portion" as "an individual's part or share of something" or "a part of a whole." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1768 (2002). "Split" means "a product of division by or as if by splitting," or "a share (as of booty, winnings, profits)." *Id.* at 2202. "Percentage" means a "part of a whole expressed in hundredths." *Id.* at 1675.

The Appellants note, citing the Second Circuit, that certain statutes use "any portion" and "any percentage" to include situations that involve the entirety of something. *Cohen*, 498 F.3d at 118-19 (citing anti-embezzlement statutes). But this is the exception, not the rule, and there are several reasons not to apply that interpretation here. None of the statutes cited by *Cohen* uses all three terms: portions, split and percentage. Using all three terms collectively emphasizes that Congress intended "part of a whole." "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S. Ct. 929 (1990) (internal quotations and citations omitted). Under the doctrine of *noscitur a sociis*, the court "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061 (1995) (internal citations and quotations omitted). A court stretches the definition of "portion, split or percentage" to its breaking point to mean 100% of a charge. Further, none of the other statutes uses "split." While portion or

percentage may be ambiguous in some limited cases, "split" requires dividing a single thing among several parties.

Finally, when read in its entirety, RESPA is an anti-kickback statute, not an anti-price gouging statute. Congress stated RESPA's purpose in 12 U.S.C. § 2601(b). It explicitly and exclusively prohibits kickback and referral fees:

> (b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
>
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) *in the elimination of kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local record keeping of land title information.

12 U.S.C. § 2601(b) (emphasis added). Section 2601's purpose statement does not discuss, mention, or even hint about a general prohibition on overcharges or unearned fees or other forms of price abuse. If

Congress meant to ban other forms of price abuse, such as undivided unearned fees or unearned fees generally, then surely it would not have used such limited language. Unearned fees are not kickbacks, and RESPA does not cover them.[9]

C.

The Appellants attempt to rehabilitate their argument by urging us to follow HUD's 2001 policy statement. They assert that this policy statement is entitled to *Chevron* deference and, accordingly, the

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[9] There is no reason to recite legislative history given the clarity of the statutory text. Nonetheless, if we must look to the legislative history, the Senate Report that details Congress's intent, S. REP. NO. 93-866 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6545, supports this interpretation. When discussing RESPA § 8, the Senate Report begins by saying that:

> Section [8] is intended to *prohibit all kickback or referral fee arrangements* whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed. Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.

Id. at 6551. (emphasis added). Just as in § 2601(b), nothing can be fairly read to cover undivided fees. The description clearly and only covers the classic kickback situation where one party refers a client to another party in exchange for a fee.

Further, all of the examples listed in the Senate Report reference charges divided among multiple parties. *Id.* If Congress meant to prohibit other forms of price gouging, such as unearned fees generally, then the Senate Report would have listed at least one example that does not involve a referral. That Congress did not list such examples strongly implies that RESPA § 8(b) did not cover such other actions.

court must adopt HUD's interpretation that RESPA § 8(b) covers undivided unearned fees. The Second Circuit adopted this rationale in *Cohen*. 498 F.3d at 115 (*citing Kruse*, 383 F.3d at 57).[10]

We are unpersuaded. When the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement. *Chevron*, 467 U.S. at 842-43. If the statute is ambiguous, the court is only required to defer to an agency's interpretation that "reasonably effectuate[s] Congress's intent." *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007). Otherwise, an agency interpretation lacks the "force of law" and will not receive *Chevron* deference, but instead will be granted Skidmore deference and given "respect proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235, 121 S. Ct. 2164 (2001). Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law. *See Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (stating that regulatory interpretations that do not follow rule-making guidelines under the APA are entitled to *Skidmore* deference only). "Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of

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[10] Other circuits have avoided the issue of whether the HUD statement is entitled to *Chevron* deference. *See Santiago*, 417 F.3d at 389 n.4 ("because we would find HUD's interpretation to be persuasive under *Skidmore*, we would not need to reach whether *Chevron* deference is warranted."); *Krzalic*, 314 F.3d at 879; *Sosa*, 348 F.3d at 984.

law–do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000). Where the agency has not used a deliberative process such as notice-and-comment rulemaking, or where the process by which the agency reached its interpretation is unclear, the court cannot presume Congress intended to grant the interpretation the force of law. For example, the Fifth Circuit has denied *Chevron* deference to IRS revenue rulings,[11] the CMS Medicaid Manual,[12] FTC interpretive rules,[13] and litigation briefs.[14] Unlike other HUD regulations interpreting RESPA, the HUD Statement of Policy was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion. Accordingly, the HUD statement is not due *Chevron* deference.

Even under *Skidmore* deference, the HUD statement is unpersuasive. The discussion of RESPA § 8(b) is perfunctory and conclusory. It expresses disagreement with the Seventh Circuit's interpretation of RESPA § 8(b) in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001) but provides no concrete reasoning for its conclusion. 66 Fed. Reg. at 53,053. HUD claims to have a "long-standing interpretation" that RESPA covers undivided unearned fees but offers no clear evidence for this point. *Id.* at 53,058. It asserts that a fee need not be

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[11] *Kornman & Assocs*, 527 F.3d 443 (5th Cir. 2008).

[12] *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004).

[13] *Walton v. Rose Mobile Homes*, 298 F.3d 470 (5th Cir. 2002)

[14] *Pool Co. v. Cooper*, 274 F.3d 173, 177 n.3 (5th Cir. 2001).

split because of the disjunctive word "or," but offers no discussion, just a conclusory statement. *Id.* It does not address any legislative history or alternate interpretation. Because we are interpreting a statute, HUD must provide some manner of statutory interpretation that would bolster its position. HUD failed to do so.

D.

Finally, the Appellants argue that RESPA should ban undivided unearned fees because this type of pricing scheme puts consumers in the same economic position as a kickback. The Third Circuit found this "same economic position" argument persuasive when analyzing whether RESPA § 8(b) prohibited markups. *Santiago*, 417 F.3d at 388-89.

This is not so much an argument as a quarrel with Congress. By its terms, RESPA does not regulate economic outcomes; it only bans certain predatory methods. Congress did not mean to criminalize the charging of fees for settlement services, however they are characterized, as long as they are disclosed and not within RESPA § 8(a) or (b). 12 U.S.C. § 2607(d) (imposing criminal penalties and potential imprisonment for any violations of RESPA § 8(b)).[15]

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[15] Our disposition of the RESPA claim necessarily requires rejection of Appellants' dependent state law claims.

IV. CONCLUSION

Because the statutory text is clear, RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services. The charges imposed by Quicken on Appellants for loan discount fees and a loan processing fee are not prohibited by RESPA § 8(b).

The judgment of the district court is **AFFIRMED**.

HIGGINBOTHAM, Circuit Judge, dissenting:

I respectfully dissent. I would, in the main, take the path set forth in the Second Circuit's well-reasoned opinion in *Cohen v. JP Morgan Chase & Company*[1] and hold that unearned undivided loan discount fees violate § 8(b) of the Real Estate Settlement Procedures Act ("RESPA").[2]

The lone aspect of *Cohen* I would not adopt is its decision to give *Chevron* deference[3] to the interpretation of RESPA § 8(b) articulated by the Department of Housing and Urban Development ("HUD") in its Statement of Policy 2001-1.[4] This Court is only required to grant *Chevron* deference to an agency's interpretation of an ambiguous statute if the

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1 498 F.3d 111, 114-26 (2d Cir. 2007).

2 12 U.S.C. § 2607(b).

3 *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

4 Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

interpretation has "the force of law,"[5] a description generally reserved for interpretations that are the product of "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force,"[6] such as traditional notice-and-comment rulemaking. The HUD Statement of Policy was not promulgated through traditional notice-and-comment rulemaking, and I am not persuaded that the process through which it was promulgated was sufficiently considered to merit *Chevron* deference. I share the Seventh Circuit's concern over the Statement of Policy's lack of analysis, which expresses disagreement with that court's decision in *Echevarria v. Chicago Title & Trust Company*[7] but gives no reason for that disagreement "except that HUD has always regarded such fees as forbidden by the statute, though previously it had failed to make this clear. No evidence or interpretive methodology is mentioned; no abuse pointed to that might justify the contorted interpretation urged by HUD."[8] As Judge Posner explained, "something more formal, more deliberative, than a simple announcement" was needed to invoke *Chevron* deference and "[a] simple announcement is all we have here."[9] While I agree with the Second Circuit that the policy statement is more than a simple

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[5] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

[6] *Id.* at 229.

[7] 256 F.3d 623 (7th Cir. 2001).

[8] *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (citations omitted), *cert. denied*, 539 U.S. 958 (2003).

[9] *See Krzalic*, 314 F.3d at 881 (citing *Barnhart*, 535 U.S. at 212, and *Mead Corp.*, 533 U.S. at 229–31).

announcement,[10] without a more formalized process through which the Agency's views might be challenged and sharpened—such as what occurs in a formal adjudication or notice-and-comment rulemaking—I would not conclude that the Statement of Policy warrants deference under *Chevron*. Per *Skidmore*,[11] I would give HUD's interpretation only such respect as is proportional to its power to persuade.

This concern aside, I would adopt the approach and conclusions of Judge Raggi's fine opinion in *Cohen*. The statutory phrase "any portion, split, or percentage of any charge . . . other than for services actually performed" is ambiguous with respect to Congress's intent to prohibit unearned undivided fees. Prohibiting such fees strikes at a core objective of RESPA: promoting transparency of costs associated with settlement. RESPA is aimed at reducing abuses by those in the mortgage industry through charging borrowers fees for work not actually performed. While the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe they are paying for something they are not. Following *Cohen* would not lead us down the path to a rate-setting regime. The task of the court is very different when determining whether any service was provided as opposed to whether the price charged is a reasonable one. When the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee—a task

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[10] *See Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59-61 (2d Cir. 2004).

[11] *See Mead*, 553 U.S. at 234-35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

for which courts are not well suited—because the reasonable fee for nothing is nothing.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. LOUISIANA

Tammy Foret FREEMAN Et Al
v.
QUICKEN LOANS, INC. Et Al.

Civil Action Nos. 08-1626, 08-1627, 08-4744. Aug. 10, 2009.

ORDER AND REASONS

CARL J. BARBIER, District Judge.

Before the Court are Defendant Quicken Loans, Inc.'s ("Quicken") and Title Source, Inc.'s ("Title Source")[1] **Motions for Summary Judgment (Rec.**

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[1] Title Source also does business under the name TSI Appraisal Services, and the TSI Appraisal Services d/b/a designation appears in some of the HUD-1 Settlement Statements referenced in the parties' briefing. The HUD-1 Settlement Statement is intended to give borrowers a statement of actual settlement costs in connection with their federally related mortgage loans. See HUD RESPA Settlement Costs and Helpful Information, June, 1997 *available at* http://www.hud.gov/offices/hsg/ramh/res/sc3sectd.cfm. The HUD-1 Settlement Statement is required to "conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement" of a federally related mortgage loan. See 12 U.S.C. § 2603(a).

Docs. 29 & 31), which seek dismissal of the claims of Plaintiffs Paul Smith and Irma Smith ("the Smiths"); Tammy Foret and Larry Scott Freeman ("the Freemans"); and John J. and Stacey B. Bennett ("the Bennetts"), as well as the putative class of persons in Louisiana similarly situated to the Bennetts (collectively "the Plaintiffs"). The Plaintiffs have asserted claims under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, and Louisiana law arising out of mortgage and loan transactions executed in 2007. Specifically, the Plaintiffs' claims relate to various loan discount and/or origination fees, loan processing fees, and appraisal fees charged in connection with the mortgage loans.

These motions were originally set with oral argument for April 1, 2009, but oral argument was cancelled due to a conflict with the Court's trial docket. After review of the record, the memoranda of counsel, and the applicable law, the Court finds that these motions should be granted, and the Plaintiff's claims should be dismissed for failure to state a claim, for the reasons that follow.

PROCEDURAL HISTORY AND BACKGROUND FACTS

The Freemans originally filed suit in the 32nd Judicial District Court for the Parish of Terrebonne ("32nd JDC") on February 19, 2008 against Quicken and Title Source, alleging that both entities charged unearned and/or nominal or duplicative fees in violation of RESPA in connection with the Freemans' mortgage loan closing. In particular, the Freemans alleged that Quicken charged a loan discount fee with

no concomitant interest rate reduction.[2] In addition, the Freemans allege that Title Source charged an appraisal fee[3] that was either split with Quicken, unearned and/or duplicative, and/or was excessive in relation to the services rendered, all in violation of RESPA. Finally, the Freemans allege that these unearned/split/excessive fees constituted breaches of the mortgage and note agreements entered between Quicken and the Freemans, and seek damages for the breaches under Louisiana law. Finally, and in the alternative, the Freemans allege that they are entitled to recoupment of the fees under a theory of "payment of a thing not owed" or unjust enrichment as a matter of Louisiana law. Quicken and Title Source removed the Freemans' suit to this Court on April 11, 2008 based on federal question jurisdiction in light of the RESPA claims.

The Smiths filed a virtually identical complaint in the 32nd JDC, alleging RESPA violations against Quicken and Title Source in connection with loan and appraisal fees in the context of mortgage loans. The slight difference between the Smiths' complaint and the Freemans' complaint is that the Smiths allege RESPA violations in connection with loan *origination* and loan *processing* fees (as opposed to loan *discount*

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[2] Specifically, the Freemans were charged a one point loan discount fee of $980, which fee was listed on line 802 of the Freemans HUD-1 Settlement Statement.

[3] Specifically, the Freemans were charged $300 for an appraisal of their residence by a local real estate appraiser, as well as an additional $80 fee with only a reference to "TSI Appraisal Services" on the HUD-1 Settlement Statement.

fees as alleged in the Freemans' complaint).[4] Howeve the Smiths allege the same basis for relief unde RESPA with respect to the appraisal fee charged b Title Source.[5] Likewise, the Smiths allege the sam Louisiana law theories of breach of contract, paymer of a thing not owed, and unjust enrichment as allege in the Freeman complaint. The Smiths' complaint wa also removed to this Court on April 11, 2008 and wa consolidated with the Freemans' action on August 2008 (Rec.Doc.8).

Finally, the Bennetts filed a putative class actio in the 32nd JDC alleging claims identical to thos alleged in the Freeman complaint on their own beha and on behalf of all other Louisiana borrowers wh transacted mortgage loans with Quicken and Tit Source.[6] The putative class action was removed to th Eastern District on October 31, 2008 and eventuall transferred to this Court for consolidation with th Freeman and Smith actions on November 25, 200 (Rec.Doc.9).

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[4] Specifically, the Smiths were charged $5,107.44 (2.875% of their total loan amount of $177,650.00), apparently as loan origination fee, as well as a $575.00 loan processing fe However, as pointed out by Quicken and Title Source, despite th fact that the $5,107.44 was listed as a loan *origination* fee on th Smiths' HUD-1 Settlement Statement, the amount was actually loan *discount* fee (see note 7 below).

[5] As with the Freemans, the Smiths' HUD-1 Settleme Statement included a $300 fee for an appraisal by a local re estate appraiser, as well as an $80 fee with a reference to "T Appraisal Services" on the HUD-1 Settlement Statement.

[6] The Bennetts were charged a loan discount fee $1,100, which was listed on line 802 of their HUD-1 Settleme Statement. Additionally, the Bennetts were charged the san $300 and $80 appraisal fees as the Freemans and Smiths.

In connection with the present motions, Quicken and Title Source filed a motion to stay all class certification proceedings and class-related discovery in the Bennett putative class action pending the resolution of these dispositive motions (Rec.Doc.26). The Court granted this motion by order of March 3, 2009 (Rec.Doc.36).

THE PARTIES' ARGUMENTS

A. Quicken & Title Source's Arguments in Support

Quicken and Title Source assert essentially the same arguments in support of their motions for summary judgment on all the Plaintiffs' claims.[7]

First, Quicken and Title Source argue that Plaintiffs' claims under Section 8(b) of RESPA fail as a

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[7] While Quicken and Title Source filed separate memoranda in support of their motions as to the Freeman/Bennett claims and the Smith claims, as well as separate reply memoranda, the arguments in each set of briefs are virtually identical, and in large part verbatim, duplicates of each other. The only difference between the two sets of briefing concerns the fact that the Smiths were charged loan *origination* and *processing* fees, whereas the Freemans and Bennetts were charges loan *discount* fees.

However, Quicken and Title Source indicate that although the HUD-1 Settlement Statement lists the fee paid by the Smiths as a loan *origination* fee, the fee charged was in fact a loan *discount* fee as evidenced by the disclosures provided to the Smiths prior to the loan closing and as indicated on the Closing Instructions to the closing agent. Accordingly, Quicken and Title Source take the position that all the Plaintiffs' claims concern solely (1) loan *discount* fees and (2) appraisal fees charged in connection with their mortgage loans.

matter of law because neither the loan discount nor the appraisal fees were split or otherwise shared. The pertinent part of Section 8(b) provides as follows:

> (b) Splitting charges
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).[8] Under the plain language of Section 8, Quicken and Title Source argue that only fee *splitting* is prohibited under RESPAthat is, situations in which a single charge is split between two parties, only one of which performed the services on which the charge was based. See *Williams v. Saxon Mortg. Servs., Inc.*, 2007 WL 1845642 (S.D.Ala. July 23, 2007); *Haug v. Bank of Am.*, 317 F.3d 832, 836 (8th Cir.2003; *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 266 (4th Cir.2002). Quicken and Title Source assert that summary judgment is proper because the loan discount fees charged to the Plaintiffs were paid to and retained solely by Quicken, and that the appraisal fees were paid to and retained solely by Title Source.

Relatedly, Quicken and Title Source cite numerous cases that have held that RESPA is not a rate-setting

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[8] Quicken and Title Source note that "Section 8" is the common reference to Section 12 U.S.C. § 2607(b), because § 2607(b) was the codification of Section 8 of the RESPA.

or price-control statute. See, e.g., *Morrisette v. Novastar Home Mortg., Inc.*, 484 F.Supp.2d 1227, 1229-1230 (S.D.Ala.2007); *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 387 (3d Cir.2005); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 56 (2d Cir.2004); *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir.2002), cert. denied, 539 U.S. 958, 123 S.Ct. 2641, 156 L.Ed.2d 656 (2003). Quicken and Title Source contend that these cases reaffirm their position that Section 8(b) is only applicable when the challenged fees are split or shared.

Further, Quicken and Title Source contend that the Plaintiffs have not alleged any specific contractual provisions that were breached in connection with their loans. First, Title Source argues that the Plaintiffs have not alleged any facts identifying any written or oral contract with Title Source. Next, Quicken argues that the various notes and related mortgage agreements are the only controlling contracts in this case. As such, the loan discount and appraisal fees were conditions of and prerequisites to the loans received by the Plaintiffs. Further, Quicken contends that the Plaintiffs have not and cannot point out any terms of the notes and mortgage agreements that Quicken breached in connection with their loans. Thus, Quicken argues that summary judgment on the Plaintiffs' contract claims is appropriate.

Additionally, Quicken and Title Source argue that the Plaintiffs' claims based on the theory of "payment of a thing not owed" are subject to summary dismissal. Very simply, Quicken and Title Source assert that both the loan discount and appraisal fees *were in fact owed* as conditions to and prerequisites of Quicken's

extension of credit to the Plaintiffs, as well as in compensation for appraisal services rendered by Title Source.

Finally, Quicken and Title Source argue that the Louisiana Credit Agreement Statute ("LCAS"), La.Rev.Stat. Ann. § 6:1122, bars the Plaintiffs' claims because those claims are not based on any alleged agreement *contained in the written note and mortgage documents.* See *Jesee Constr. Corp. v. NationsBank Corp.,* 830 So.2d 989, 990-92 (holding that "[t]he Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery asserted," and, thus, the statute barred all of plaintiffs' claims, including those for breach of contract, detrimental reliance, negligent misrepresentation, unfair trade practices, breach of the duty of good faith and fair dealing, promissory and equitable estoppel, and breach of fiduciary duty); see also *King v. Parish Nat'l Bank,* 2004-0337 (La.10/19/04); 885 So.2d 540, 542-48. Quicken and Title Source assert that the Plaintiffs' claims are "exactly what the [CAS] is intended to prevent-a claim by a borrower disputing the terms of the loan that is not based on any written contractual provision."

As for the Plaintiffs' unjust enrichment claims, Quicken and Title Source argue that the Plaintiffs have failed to present any evidence on two essential elements of an unjust enrichment cause of action. See *Finova Capital Corp. v. IT Corp.,* 774 So.2d 1129, 1132 (La.App. 2 Cir. 12/15/00) (describing the five elements of an unjust enrichment claim: 1) there must be an enrichment; (2) there must be an impoverishment; (3)

there must be a connection between the enrichment and the resulting impoverishment; (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment; and (5) there must be no other remedy at law available to the plaintiff). Specifically, Quicken contends that the Plaintiffs have not shown an absence of justification or cause for the discount fees, which were disclosed as a component of the pricing of the Plaintiffs' loans to allow comparisons of the costs of Quicken's loan and those of other lenders. Further, Title Source argues that the appraisal fee was charged in return for its efforts in locating and contacting appraisers, scheduling appointments, reviewing appraiser reports, etc. in connection with the Plaintiffs' mortgage loans from Quicken. See Eisenshtadt Affidavit, Rec. Doc. 29-7. As such, Quicken and Title Source argue that the loan documents provide the legal cause for payment of the fees, and thus an unjust enrichment claim is inappropriate as a matter of law. Furthermore, Quicken and Title Source point out that the Plaintiffs have other remedies at law, as evidenced by their RESPA, breach of contract, and "payment of a thing not owed" claims in all three petitions at issue.

B. The Plaintiffs' Opposition

The Plaintiffs have filed a joint opposition memorandum in response to Quicken and Title Source's motions. First of all, the Plaintiffs point out that Quicken makes no argument that the Plaintiffs were *actually given a loan discount in return for the fees paid.* The Plaintiffs suggest that this amounts to an admission that the Plaintiffs *did not receive a corresponding discount for the fee paid.* Next, the

Plaintiffs note that despite Quicken and Title Source's argument that courts have consistently interpreted claims under Section 8(b) as requiring some fee splitting arrangement, both the Second and Eleventh Circuits have held that a single service provider can violate Section 8(b). See *Cohen v. JP Morgan Chase & Co., Inc.*, 498 F.3d 111, 113 (2nd Cir.2007) (holding that single lender can violate Section 8(b) by imposing charge for which no services were provided based on language of statute and *Chevron* deference to HUD statement of policy); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 981 (11th Cir.2003) (holding that Section 8(b) can be violated by single settlement service provider). The Plaintiffs also note that Quicken failed to mention that the fee-splitting issue under Section 8(b) is again before the Eleventh Circuit in a case in which Quicken is itself a named defendant. *Wooten et al v. Quicken Loans, Inc.*, Appeal No. 08-11245 (11th Cir.2008). Furthermore, the Plaintiffs note that HUD has issued a statement of policy reaffirming its "long standing" position that *any unearned fees* are improper under RESPA. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed.Reg. 53,053, 53,053 (Oct. 18, 2001) (hereinafter "the 2001 HUD SOP"). Based on the 2001 HUD SOP and the disagreement among the circuits regarding the requirement of a fee-splitting arrangement under Section 8(b), the Plaintiffs argue that Quicken's motion must be denied as it relates to Plaintiffs' claims based on the loan discount fees.

As for the Plaintiffs' claims regarding the appraisal fees, Plaintiffs contend that they have in fact alleged that the $80 appraisal services fee *may have been* split between Quicken and Title Source. The

Plaintiffs have attached the Affiliated Business Arrangement Disclosures that they all received in connection with their loans from Quicken. See Rec. Docs. 38-12-14. These disclosures indicate that Quicken and Title Source are owned by the same company (Rock Holdings, Inc.) and that Quicken has a business relationship with Title Source that may provide a benefit to Quicken as a lender. In addition, the disclosures note that Quicken and Title Source operate at the same address in Livonia, Michigan. The Plaintiffs argue that these disclosures alone present an issue of material fact as to whether the appraisal fee was split between Quicken and Title Source that precludes summary judgment. See *Szezubelek v. Cendant Mortg. Corp.*. 215 F.R.D. 107 (D.N.J.2003) ("Whether the 'appraisal management services' performed by [appraisal service company] was bona fide, as Defendants argue, or a mere duplication of work, the position urged by Plaintiffs, creates a genuine issue of material fact making summary judgment inappropriate.").

Finally, the Plaintiffs distinguish the cases cited by Quicken and Title Source for the proposition that RESPA is not a price-control statute by noting that their claims do not assert mere overcharges by Quicken and Title Source, but rather involve claims for charges that do not correspond to any services rendered.

The Smiths specifically address their opposition to Quicken and Title Source's motion, given the fact that they were charged a loan *origination* fee according to their HUD-1 Settlement Statement, as opposed to a loan *discount* fee as was charged to the other

Plaintiffs. First, the Smiths argue that if the amount charged was a loan *origination* fee, which Quicken's website describes as essentially an administrative fee for compiling ans packaging loan documents, then the fee violated RESPA because no work, or merely nominal or duplicative work, was performed in connection with the loan *origination* and loan *processing* fees. However, if the *origination* fee was in fact charged as a *discount* fee-which fact the Smiths assert has only recently been disclosed in a *footnote* to Quicken's memoranda in support of its present motion *nearly two years* after the Smiths' loan was closed-then Quicken has essentially admitted a per se RESPA violation because the HUD-1 Settlement Statement incorrectly identified the basis for the $5,107 .44 fee. Finally, even if the fee was a *discount* fee, the Smiths' argue that their case is essentially the same as the Freemans' and Bennetts' case in that the alleged discount fee did not result in any reduction in interest rate on their loan. As such, regardless of whether the fee was an *origination* or *discount* fee, the Smiths argue that there is a material question of fact as to whether the fee was proper under Section 8(b) of the RESPA.

Based on the validity of their RESPA claims as outlined above, the Plaintiffs argue that their Louisiana contract claims are also viable. Despite Quicken's argument that the Plaintiffs have not alleged the breach of any provisions of the governing note and mortgage documents, the Plaintiffs cite the "Loan Charges" section, which appears in both the notes and mortgages executed by the Plaintiffs. This section provides in pertinent part that the "[l]ender may not charge fees that are expressly prohibited by ...

Applicable Law," which is defined as "all controlling applicable federal, state and local statutes, regulations ... and administrative rules and orders ... as well as all final, non-appealable judicial opinions." See Rec. Docs. 38-4, -6, & -8. Based on this provision, the Plaintiffs contend that because RESPA governed their notes and mortgages, the violations of RESPA alleged in their complaints constituted a breach of the "Loan Charges" section of those contracts. As such, the Plaintiffs assert that they have, in fact, alleged the breach of express provisions of the notes and mortgages via their allegations of RESPA violations.

Relatedly, the Plaintiffs reiterate that Quicken has essentially admitted in its briefing that no reduction in interest rates was provided in return for the discount fee charged. Further, the Plaintiffs contend that various documents provided by Quicken reveal that no interest rate discount was ever contemplated in return for the discount fees. Specifically, the Plaintiffs point out that line 802 of the Bennett and Freeman HUD-1 Settlement Statements indicate that they paid discount points, but the corresponding entry for "bought down rate" on the Underwriting Analysis Reports for their loans was zero. See Rec. Docs. 38-9 & -10, -23 & -32. The same is true for the Smiths' HUD-1 Settlement Statement and analysis reports, assuming that their origination fee was in fact a discount fee. See Rec. Doc. 38-33. Additionally, this same zero "bought down rate" appears in the Uniform Underwriting and Transmittal Summaries that Quicken completed in an apparent effort to sell the Plaintiffs loans. See Rec. Docs. 38-39 & -40. Further, the Plaintiffs argue that they did not have the option to decline these discount fees. Rather, the Plaintiffs

assert that the fees were charged as an unspecified and undisclosed component of the loan pricing, and/or were misrepresented or unlisted on their HUD-1 Statements, all in violation of RESPA. Either way, Plaintiffs argue that the discount fees violate RESPA, whether they were improper charges for a non-rendered discount service, or misrepresentations of proper pricing components in the guise of discount fees.

As for their contract claims against Title Source, Plaintiffs dispute Title Source's argument that they have not identified any binding contract between the Plaintiffs and Title Source. Rather, the Plaintiffs contend that the business relationship between Quicken and Title Source, as well as the fact that the Plaintiffs were *required* to use Title Source (d/b/a TSI Appraisal Services, Inc.) under the terms of the Quicken mortgage contract, imputes the contractual privity between the Plaintiffs and Quicken to Title Source.

The Plaintiffs also assert that they have established a claim for payment of a thing not owed under Louisiana law. Specifically, the Plaintiffs argue that the present record indicates that Quicken and Title Source charged loan discount, origination, processing, and/or appraisal fees for services that were never provided.

Additionally, the Plaintiffs assert that their unjust enrichment claim should not be dismissed on summary judgment because no legal cause or justification exists for the fees charged by Quicken and Title Source and because unjust enrichment may eventually be their

only basis for a claim. The Plaintiffs reiterate that Quicken has essentially admitted that the discount fees did not correspond to any actual interest rate discount, and has instead asserted that the discount fee was a built-in component of loan pricing. As noted earlier, the Plaintiffs argue that the discount fees were either unearned, or misrepresented on their HUD-1 Settlement Statements in violation of RESPA. Further, the Plaintiffs assert that loan discount points can *only* be reasonably construed under industry, HUD, and Quicken's own definitions as *optional* charges to reduce interest rates, and cannot be characterized as built-in, predetermined components of loan pricing. As such, Plaintiffs contend that their unjust enrichment claims should not be subject to summary judgment.

Finally, the Plaintiffs contend that the CAS does not preclude their claims because none of their claims are based on *oral* agreements, and the CAS applies solely to bar claims based on oral credit agreements. See *Jenco Constr. Corp v. NationsBank Corp.*, 830 So.2d 989, 990-92 ("[T]he [CAS] precludes all actions for damages arising from oral credit agreements.").

C. Quicken and Title Source's Reply

In reply, Quicken and Title Source have filed two essentially identical briefs in further support of their motions for summary judgment on the Freeman/Bennett and Smith claims. As an initial matter, Quicken and Title Source argue that the Plaintiffs have not presented any competent summary judgment evidence to refute the assertions in the various affidavits submitted in support of the present

motions. Specifically, Quicken argues that the Smiths have not presented any evidence, other than their bare reference to their HUD-1 Settlement Statement, which admittedly incorrectly refers to the loan *discount* fee as a loan *origination* fee, to refute the affidavit of Michael Lyon that the charge was in fact a discount fee. Furthermore, Quicken and Title Source argue that none of the Plaintiffs have refuted the Lyon Affidavit's assertion that the loan discount fees were not split. While the Plaintiffs refer to certain documents that *may* reveal a splitting of certain portions of the discount fee,[9] Quicken and Title Source argue that this is pure speculation. In addition, to the extent that the Plaintiffs request additional discovery on this issue,[10] this request is improper under Rule 56(f) of the Federal Rules of Civil Procedure. Finally, Quicken argues that the Plaintiffs have failed to present any summary judgment evidence to refute the Lyon Affidavit's assertion that the discount fees were conditions of and prerequisites to their loans.

As for the appraisal fees, Title Source argues that the Plaintiffs have failed to present any summary judgment evidence to refute the affidavits submitted by Quicken and Title Source that the appraisal fees were not split. Further, Title Source contends that the

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[9] See Rec. Docs. 38-20, -24, -32, which reference a "premium" that the Plaintiffs allege *may* refer to a portion of the loan discount fee that *may* have been split with a third-party transferee to whom their loans were sold immediately after closing. See Rec. Doc. 38-1, Statement of Contested/Uncontested Facts for Freeman and Bennett Plaintiffs, at ¶¶ 4 & 12.

[10] This request appears in paragraphs 4 and 12 of the Plaintiffs' Statement of Uncontested Material Facts. See Rec. Doc. 38-1, ¶¶ 4, 12.

Plaintiffs' reliance on the business relationship between Quicken and Title Source as a basis for its argument that the appraisal fees were split is not *evidence* to defeat summary judgment. Likewise, Title Source argues that the Plaintiffs have not presented any competent evidence to refute the Eisenshtadt Affidavit that appraisal services were actually rendered in return for the appraisal fee. Finally, Title Source disputes the Plaintiffs' argument for contractual privity with Title Source by way of their contract with Quicken. Title Source argues that, despite the Plaintiffs' unsupported speculations, it is a completely separate corporate entity from Quicken, and thus the Plaintiffs' strained privity of contract argument fails because it improperly attempts to pierce the corporate veil of Title Source.

Quicken also responds to the Plaintiffs' argument regarding the circuit split with respect to whether Section 8(b) of RESPA allows for claims in non-fee splitting situations. First, Quicken contends that the Plaintiffs misconstrue the loan discount fee (and the processing fee in the Smiths' case) as an unearned *settlement* service governed by RESPA. In this context, Quicken notes the Plaintiffs' reliance on *Wooten,* a case currently pending before the Eleventh Circuit in which Quicken is a defendant. The district court in *Wooten* dismissed the plaintiffs' claims under Section 8(b) of the RESPA based on loan discount fees charged by Quicken in connection with the plaintiffs' mortgage loans. 2008 WL 687379 (S.D.Ala. Mar.10, 2008). The *Wooten* court found that the loan discount fees were not settlement services as defined by RESPA, and thus could not form the basis of a Section 8(b) violation. Thus, Quicken argues that the

Plaintiffs' RESPA claims based on their loan discount fees fail under *Wooten* because loan discount fees are not fees for settlement service under RESPA.

Nonetheless, Quicken goes on to argue that even if loan discount fees are fees for settlement services subject to RESPA constraints, Plaintiffs are incorrect in their assertion that "discount points" may only be charged in connection with an actual interest rate reduction. To the contrary, Quicken points out that its website indicates that discount points are only "generally" linked to interest rates, and further notes that the Sixth Circuit has held that the term "loan discount" has several differing definitions. *Vandenbroeck v. Commopoint Mortg. Co.*, 210 F.3d 696, 702 (6th Cir.2000) abrogated on other grounds by *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, ---, 128 S.Ct. 2131, 2137, 170 L.Ed.2d 1012 (2008).

Finally, Quicken argues that Plaintiffs have misconstrued the holdings of the *Sosa* and *Cohen* decisions. Quicken contends that courts have characterized claims under Section 8(b) for only four types of settlement fees: (1) split fees; (2) markups; (3) overcharges; and (4) undivided, unearned fees. Quicken notes that the Plaintiffs have only asserted claims that the loan discount and appraisal fees were split, and/or that the loan discount fees were unearned fees charged by and paid to Quicken.

Quicken argues that the Plaintiffs' reliance on the Eleventh Circuit's opinion in *Sosa* is inappropriate because that case concerned a *markup* claim, not a split or unearned fee claim. *Sosa*, 348 F.3d at 983. Further, Quicken notes that the *Sosa* court affirmed

the dismissal of the plaintiff's markup claims for failure to allege that the lender did not render *any services at all* corresponding with the alleged markup. *Id.* Thus, because *Sosa* did not address the situation in which a lender charges an entirely unearned fee, Quicken argues that *Sosa* is irrelevant on the question of whether the "portion, split, or percentage" language of Section 8(b) applies to an entirely unearned fee retained solely by a lender.

Likewise, Quicken argues that the Plaintiffs' reliance on the Second Circuit's decision in *Cohen* is misplaced. First, Quicken acknowledges that the *Cohen* decision did recognize a Section 8(b) claim for allegedly unearned settlement service fees retained by a lender. However, Quicken asserts that the Plaintiffs in this case cannot establish that Quicken did not provide any services in connection with the loan discount fees charged. Furthermore, Quicken argues that the *Cohen* decision was improperly decided and should not be followed. Quicken notes that the *Cohen* decision relied on the 2001 HUD SOP to determine whether the "portion, split, or percentage" language of Section 8(b) allows for claims based on an allegedly unearned, unsplit fee. The *Cohen* court initially noted that the language of Section 8(b), as well as its legislative history, contemplates only claims based on fee splitting in the context of federally related mortgage loan settlements. 498 F.3d at 122-23. Nonetheless, the *Cohen* court found that the language of Section 8(b) was ambiguous and thus subject to HUD's agency interpretation for clarification. *Id.* at 120. Quicken argues that the *Cohen* court improperly deferred to the 2001 HUD SOP and utilized unreliable principles of statutory interpretation to conclude that

Section 8(b) applies to unearned fees that are not split. Quicken argues that the *Cohen* court improperly applied the principles of *Chevron* deference to an agency's interpretation of a statute, because the 2001 HUD SOP created ambiguity in RESPA where none existed. Quicken further notes that several other courts have rejected the interpretation of the 2001 HUD SOP and held that Section 8(b) only allows claims in the context of fee splitting. See *Santiago,* 417 F.3d 387; *Kruse,* 383 F.3d at 57; *Krzalic,* 314 F.3d at 881; *Boulware v. Crossland Mortgage Corp.,* 291 F.3d 267.

In the end, Quicken argues that the allegedly unearned fees were simply an amount retained as loan-related fees and the lender's income on the loan. To the extent that the 2001 HUD SOP attempts to expand RESPA's reach beyond the realm of fee splitting protections and into the area of price regulation and control, Quicken argues that the agency's interpretation is inconsistent with the congressional purposes in enacting RESPA, and thus should not be accorded any deference. Further, Quicken argues that *Cohen* is ultimately inapplicable because the Plaintiffs cannot show that the discount fees were unearned. Rather, as proven in the affidavits submitted by Quicken, the discount fees were prerequisites to the Plaintiffs' receiving their loans on the terms and at the specified rates that they agreed to. Additionally, these affidavits prove that the discount fees were not split with any other party. Finally, Quicken argues that the discount fees can only be characterized, if they are at all inappropriate, as overcharges, which courts have consistently held are not actionable under Section 8(b). See *Patino v.*

Lawyers Title Ins. Corp., 2007 WL 4687748, *3 (N.D.Tex. Jan.11, 2007) (collecting cases). Thus, Plaintiffs' claims are inappropriate under any of the viable Section 8(b) grounds.

As a final note, Quicken argues that, to the extent the Plaintiffs base their claims on the alleged misrepresentation of the loan discount fees in the HUD-1 Settlement Statements, no private right of action exists under RESPA for an inaccurate settlement statement. Further, Quicken argues that because Plaintiffs' breach of contract claims regarding the discount fees are admittedly dependent on the validity of their RESPA claims, the breach of contract claims should be dismissed. Likewise, Title Source argues that because Plaintiffs' breach of contract claims regarding the appraisal fees are based solely on the theory that Quicken and Title Source are the same entity, those claims should also be dismissed. Finally, Quicken and Title Source argue that the Plaintiffs' "payment of a thing not owed" and unjust enrichment claims fail because the discount and appraisal fees *were* in fact owed and justified, either as prerequisites of the loan (e.g. the discount fee) or in return for appraisal services rendered. Furthermore, Quicken again argues that the CAS bars plaintiffs' claims on these grounds, because Plaintiffs have failed to cite any *written* agreement in which Quicken agreed to lower their interest rate in return for the discount fees.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (citing Fed. R. Civ. Proc. 56(c)). The moving party bears the initial burden of demonstrating to the court that there is an absence of genuine factual issues. *Id.* Once the moving party meets that burden, the non-moving party must go beyond the pleadings and designate facts showing that there is a genuine issue of material fact in dispute. *Id.* "A factual dispute is 'genuine' where a reasonable jury could return a verdict for the non-moving party. If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial and summary judgment is proper." *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 272 (5th Cir.2000) (citations omitted). The non-moving party's burden "is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence. [The courts] resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *[The courts] do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary*

facts." Little, 37 F.3d 1075 (emphasis in original) (citations omitted).

B. Section 8(b) of RESPA and the Circuit Split

The Plaintiffs have asserted claims under Section 8(b) of RESPA, which in turn form the foundation of their Louisiana state law contractual claims. As such, the applicability vel non of Section 8(b) to the Plaintiffs' claims is the crux of this matter.

Section 8(b) of RESPA, entitled "Splitting Charges," provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b). The term "settlement service" includes:

> **any service provided in connection with a real estate settlement** including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding

> of loans), and the handling of the processing, and closing or settlement

12 U.S.C.A. § 2602(3) (emphasis added).

When RESPA was first enacted in 1974, Congress specifically indicated several problems that the act was intended to address in the context of the real estate settlement process. One of these general problems was the "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." S.Rep. No. 93-866 as reprinted in 1974 U.S.C.C.A.N. 6546, 6547 (hereinafter "RESPA Senate Report"). To solve this problem, Congress enacted Section 8(b)

> to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed.

Id. In fact, the general statement of purpose for RESPA indicates that the act was broadly intended to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2607(a). Despite the fact that Section 8(b) speaks primarily in terms of situations in which two or more parties split or share a fee, whether unearned or only

partially earned, several circuit courts have split on the issue of whether Section 8(b) provides a claim in a situation where a *single* settlement services provider retains unearned fees. The circuit split hinges on two pieces of language from Section 8(b): (1) "[n]o person shall give and no person shall accept"; and (2) "any portion, split, or percentage of any charge." 12 U.S.C. § 2607(b).

Complicating this circuit split is the 2001 HUD SOP, which identifies four types of settlement service fees that, according to the agency, give rise to Section 8(b) violations:

> (1) For **two or more** persons to **split** a fee for settlement services, any portion of which is unearned; or (2) for **one** settlement service provider to **mark-up** the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for **one** settlement service provider to charge the consumer a fee where **no, nominal, or duplicative work** is done, or the fee is in **excess of the reasonable value of goods** or facilities provided or the services actually performed.

2001 HUD SOP 66 Fed.Reg. 53,053, 53,059 (emphasis added). The 2001 HUD SOP goes on to state that "[i]n HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service-including up to 100%-that is unearned, **whether the entire charge is divided or split**

among more than one person or entity or is retained by a single person." *Id.* (emphasis added).

The 2001 HUD SOP was issued in response to the Seventh Circuit's ruling in *Echevarria v. Chicago Title and Trust* Co.,256 F.3d 623, 627 (7th Cir.2001), which held that Section 8(b) claims must include an allegation of some splitting or sharing of the challenged charges notwithstanding the language of HUD's so-called "Regulation X" and other agency materials. *See Id.* at 53,052. Regulation X, codified at 24 C.F.R. § 3500.14, provides in pertinent part that "[a] charge by ***a person*** **for which no or nominal services are performed** or for which duplicative fees are charged is an unearned fee and violates this [Section 8(b)]." (emphasis added). Thus, Regulation X suggests that a ***single entity*** can violate RESPA by charging for unperformed or underperformed settlement services. Notwithstanding this provision, the *Echevarria* court noted that the numerous other references to splitting or sharing of fees in Regulation X resulted in ambiguity in the regulation that would not justify overruling of prior Seventh Circuit precedent requiring an allegation of fee splitting for a Section 8(b) claim. *Echevarria,* 256 F.3d at 628. As such, "[a]bsent a formal commitment by HUD to an opposing position, [the *Echevarria* court] decline[d] to overrule [its] established RESPA § 8(b) case law." *Id.* at 630. The 2001 HUD SOP was HUD's attempt at a "formal commitment" to its position that even undivided fees are actionable under Section 8(b). It should be noted, however, that even after the issuance of the 2001 HUD SOP and the continued effectiveness of Regulation X, several courts have determined that

Section 8(b) is simply unambiguous on its face in requiring a split of the challenged fee, and thus the agency interpretations to the contrary are not entitled to any deference under *Chevron* principles. See, e.g., *Haug,* 317 F.3d at 839; *Boulware,* 291 F.3d at 267; *Krzalic,* 314 F.3d at 881.

As is apparent, the 2001 HUD SOP clearly contemplates the possibility of *unilateral* Section 8(b) violations by a settlement services provider, notwithstanding the statutory language suggesting that only multi-party sharing or splitting of fees is governed by Section 8(b). Regardless, courts have derived and analyzed in light of the 2001 HUD SOP the following four distinct categories of fees that may give rise to Section 8(b) violations:

> (1) ***Unearned Split Fees***-These are fees charged by a settlement service provider to a borrower for services performed by a third-party, which are then split between the service provider and the third-party. "The statutory language describes a situation in which A charges B (the borrower) a fee of some sort, collects it, and then either splits it with C or gives C a portion or percentage (other than 50 percent-the situation that the statutory term "split" most naturally describes) of it." *Krzalic v. Republic Title Co.,* 314 F.3d 875, 881 (7th Cir.2002). This is the most basic and clearly contemplated type of prohibited fee scenario contemplated by Section 8(b). However, a claim for fee-splitting under Section 8(b) "must allege that the defendant shared an unearned fee with a third party to the real estate transaction." *Weizeorick v. ABN AMRO Mortg. Group, Inc.,* 337

F.3d 827, 831 (7th Cir.2003). In other words, if the settlement service provider charges an excessive fee for third-party services, but simply retains the overage itself without sharing or splitting that overage with the third-party who rendered the services, no Section 8(b) violation has occurred. This latter scenario would simply constitute an overcharge (see below), and "[t]hose Circuits that have addressed the issue ... universally hold that a bare allegation that a settlement service provider overcharged for its services is insufficient to make out a [Section] 8(b) violation." *Patino v. Lawyers Title Ins. Corp.*, 2007 WL 4687748, *3 (N.D.Tex. Jan.11, 2007) (collecting cases). **The Plaintiffs' have alleged that Quicken and Title Source improperly split the appraisal services fee in this case.**

(2) ***Markups***-Markups are fees charged to a borrower and retained by a settlement service provider for third-party services in excess of the value of those services. The Fourth, Seventh, and Eighth Circuits have held that the text of section 8(b) clearly and unambiguously *does not prohibit* mark-ups based on the "no person shall give and no person shall receive" language of Section 8(b). See *Boulware*, 291 F.3d at 266 (4th Cir.); *Krzalic*, 314 F.3d at 881 (7th Cir.); *Haug*, 317 F.3d at 836. Specifically, these courts have held that Section 8(b) requires both a giver "and" a receiver, and thus applying Section 8(b) to mark-ups would have absurd results because the giver of the marked up fee-the borrower-would be equally culpable under the language of Section 8(b) as the acceptor of the

marked up fee-the lender/settlement service provider. See, e.g., *Boulware,* 291 F.3d at 266.

However, the Second and Eleventh Circuits have held that mark-ups may be actionable under Section 8(b) against a sole lender/settlement service provider who retains the overage of a marked-up fee, *but only if* the plaintiff alleges that the lender/settlement service provider retained the overage without performing *any services whatsoever* to justify its retention. *See Kruse v. Wells Fargo Home Mortg., Inc.,* 383 F.3d 49, 55-57 (2d Cir.2004); *Sosa,* 348 F.3d at 982-83 (11th Cir.). While the Fourth, Seventh, and Eighth Circuits foresaw absurd results if Section 8(b) were held *not* to require at least two actors, the *Sosa* court found just the opposite that "[e]xtending liability only if there were both a culpable giver and acceptor of an unearned fee would lead to irrational results." *Sosa,* 348 F.3d at 983. Specifically, one provider could decide to give a kickback to another, who then refused to accept the kickback. *Id.* Under the other circuits' position, this would not result in a Section 8(b) violation because there was not both a giver and an acceptor. *Id.* The Plaintiffs in this case have not alleged any RESPA violations for marked up settlement service charges, but an understanding of the circuit-split on the issue of mark-ups under Section 8(b) is essential to the analysis in this case.

(3) ***Unearned, Undivided Fees***[11]-These are fees charged to the borrower by a single lender/service provider for which no correlative service is performed. The only court to address this very specific type of fee in the context of Section 8(b) was the Second Circuit in *Cohen v. JP Morgan Chase & Co., Inc* ., which is discussed at length below. 498 F.3d 111 (2d Cir.2007). The *Cohen* court, relying on the 2001 HUD SOP and the conclusion in *Kruse* that Section 8(b) does allow claims against single settlement service providers, held that "RESPA [Section] 8(b) ... prohibit[s] 'one service provider' from charging the consumer a fee for which 'no ... work is done." *Id.* at 126. **The Plaintiffs have alleged in this case that Quicken improperly retained the loan discount fees and/or loan origination and processing fees (viz. The Smiths) as unearned, undivided fees.**

(4) ***Overcharges***-These are charges "in excess of the reasonable value" of the actual services provided that are nonetheless retained by a single lender/settlement service provider. As noted above, every court to address Section 8(b) claims for overcharges has held that RESPA does not allow such claims. Specifically, RESPA is not intended to function as a price-fixing statute that dictates the "reasonable" value of loan settlement services. *Kingsberry v. Chicago Title Ins. Co.* 586 F.Supp.2d

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[11] This category is derived from the language in the 2001 HUD SOP indicating that a Section 8(b) violation will arise where "one settlement service provider [charges] the consumer a fee where no, nominal, or duplicative work is done."

1242, 1247 (W.D.Wash.2008) ("Congress did not intend to use RESPA as a means of fixing [the] rates for real estate settlement charges[.]") (citations omitted). In other words, "nothing in [the statutory] language authorizes courts to divide a 'charge' into what they or some other person or entity deems to be its 'reasonable' and 'unreasonable' components." *Kruse*, 383 F.3d at 56. Rather, "[w]hatever its size, such a fee is 'for' the services rendered by the institution and received by the borrower." *Id.* The Plaintiffs in this case have not asserted claims based on alleged overcharges. See Rec. Doc. 38, p. 11.

i) The Circuits that have Allowed Section 8(b) Claims for Undivided Fees

As noted above, the Second and Eleventh Circuits have held that Section 8(b) does provide a cause of action when a single settlement service provider retains unearned fees in connection with a federally related mortgage loan.

a) *Cohen v. JP Morgan Chase & Co., Inc.* (2d Cir.2007)

In *Cohen v. JP Morgan Chase & Co., Inc.*, the court held that the plaintiff could maintain a Section 8(b) action based on a $225 "post-closing" fee that was allegedly retained by the home mortgage refinancing lender without any corresponding services rendered. 498 F.3d 111, 113 (2d Cir.2007). The district court in *Cohen* had dismissed the plaintiff's case for failure to state a claim based on the lack of any allegation that the challenged fee was split between the lender and

any other party, as well as the district court's finding that the fee at issues was analogous to a non-actionable overcharge under the Second Circuit's decision in *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 55-57 (2d Cir.2004). The *Cohen* court's analysis proceeded under the principles of *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and its progeny.

Initially, the *Cohen* court distinguished the fees in *Kruse* from those at issue in *Cohen*. Specifically, the *Cohen* court noted that the *Kruse* decision only invalidated claims under Section 8(b) based on *overcharge* fees. *Id.* at 114. Thus, because the plaintiff's claims in *Cohen* were not based on an *overcharge* as in *Kruse*, but were rather based on *unearned, undivided* charges, the *Cohen* court held that the district court's reliance on *Kruse* in its dismissal of the plaintiff's claims was inappropriate. The *Cohen* court cited the 2001 HUD SOP as the basis for its distinction of the *Kruse* case, noting that the 2001 HUD SOP indicates that a claim based on an unearned, undivided fee will lie under Section 8(b). *Id.* (quoting the 2001 HUD SOP, 66 Fed.Reg. 53,053, 53,059). The *Cohen* court noted that while the *Kruse* case held that the 2001 HUD SOP was contrary to the plain meaning of Section 8(b) with respect to *overcharge* fees, it left open the question as to whether the agency's statement correctly interpreted Section 8(b) with respect to *unearned, undivided* fees. *Id.* at 115.

The *Cohen* court went on to note that while *Kruse* rejected the 2001 HUD SOP's position regarding

overcharge fees, it also accepted another crucial aspect of the 2001 HUD SOP. Specifically, the *Kruse* court held that Section 8(b) was ambiguous with respect to its coverage of claims based on *marked-up* fees. *Id* . (citing *Kruse,* 383 F.3d at 58). Accordingly, the *Kruse* court accepted the 2001 HUD SOP's policy statement that essentially allows for a claim based on settlement service fee markups, even when the markups are retained solely by the lender and are not split with third-party service providers whose service charges were marked up by the lender. See *Kruse,* 383 F.3d at 61-62. The *Cohen* court noted that this ruling in the *Kruse* decision was based on a finding of ambiguity in Section 8(b)'s use of the phrase "[n]o person shall give **and** no person shall accept," which the Fourth, Seventh, and Eighth Circuits had held to be unambiguous in requiring both a culpable giver *and* acceptor of a challenged fee. *Cohen,* 498 F.3d at 115 n. 3. In other words, the *Kruse* court held contrary to those other circuits that a single service provider may be liable under Section 8(b) for marking up settlement service fees even when the markup is not shared with a third-party. In addition, the *Cohen* court noted that *Kruse* relied on the Eleventh Circuit's ruling in *Sosa* to support its opinion that a Section 8(b) claim may lie against a sole service provider who charges and retains a marked up fee. *Id.* Thus, despite the difference in the types of fees addressed by the *Kruse* court, the *Cohen* court followed the *Kruse* court's precedent that Section 8(b) *can* apply to individual settlement service providers, as indicated in the 2001 HUD SOP, due to the ambiguity of the statute.

Based on this precedent that a single service provider can be liable for Section 8(b) violations, the

Cohen court addressed whether a single service provider could be liable under Section 8(b) for charging fees for which no services were provided. Initially, the *Cohen* court found that the "any portion, split, or percentage of any charge" language of Section 8(b) is ambiguous as to whether its restrictions apply to undivided, unearned fees. *Id* . at 117. The court recognized that "[b]ecause the words 'portion,' 'split,' and 'percentage' are commonly understood to reference things that have been divided and that are less than a whole, their use together in RESPA § 8(b) could plausibly be understood to signal a legislative intent to prohibit unearned fees *only when reflected in divided charges.*" *Id.* at 117. However, the *Cohen* court went on to note that the *context* of Section 8(b) supports a conclusion that even undivided, unearned fees should be regulated under the statute. First, the court noted that use of the word "any" generally indicates Congress's intent that the statute sweep broadly. *Id.* at 117-118. Next, the *Cohen* court noted that while the Fourth, Seventh, and Eighth Circuits have all held that division of the challenged fee is necessary for a Section 8(b) claim, those holdings were in the context of the phrase "[n]o person shall give and no person shall accept", which those courts held to require at least two actors for a Section 8(b) violation. *Id.* at 119. The Second Circuit in *Kruse,* however, rejected this requirement of a culpable giver and acceptor, which itself contemplates division of the challenged charge. *Id.* In the end, the *Cohen* court held that "Congress's serial reference to *'any* portion, split, or percentage of any charge' in § 8(b) can plausibly be construed to demonstrate a legislative intent to sweep broadly,

prohibiting all unearned fees, however structured." *Id.* at 120 (emphasis in original).

Next, the *Cohen* court considered the structure, purpose, and history of Section 8(b) in an attempt to clarify its ambiguity. Initially, as a matter of structure, the court noted that Section 8 is generally entitled "Prohibition against kickbacks and unearned fees," while Section 8(b) is specifically entitled "Splitting charges." *Id.* at 121. Despite the fact that these titles suggest a division requirement, the *Cohen* court held that the structure of Section 8 does not clarify the ambiguity in the phrase "any portion, split, or percentage of any charge." *Id.* In terms of the purpose of Section 8, the *Cohen* court noted that the purpose statement of RESPA does not specifically address undivided fees, and in fact only addresses "kickbacks or referral fees." *Id.* at 122 (citing 12 U.S.C. § 2601(b)). Nonetheless, the court also pointed out that the purpose statement also provides an overall goal of protecting consumers from "abusive practices" that result in "unnecessarily high settlement charges," which further underlines the ambiguity in Section 8(b) on the issue of undivided fees. *Id.* (citing 12 U.S.C. § 2601(a)). Finally, the *Cohen* court pointed out that the RESPA Senate Report, which it described as the "most authoritative[ ]" statement of the act's legislative history, refers exclusively to examples of divided fee scenarios, but nonetheless does not indicate that Congress *conclusively or directly considered and rejected* a provision prohibiting claims for undivided fees. *Id.*

As a result of the remaining ambiguity of the statute after these initial *Chevron* inquiries, and given

Congress's grant of "broad authority" to HUD to administer RESPA, the *Cohen* court moved on to the second *Chevron* step of considering whether the 2001 HUD SOP reasonably construes Section 8(b) to apply to undivided, unearned fees. *Id.* at 124. First, the court noted that HUD has, since the first 1976 edition of its consumer information booklet, consistently indicated that it is illegal "to charge or accept a fee or part of a fee where no service has actually been performed." *Id.* at 125 (citations omitted). As such, and based on its finding that the 2001 HUD SOP is reasonable in its conclusion that an unearned, undivided fee is actionable under Section 8(b), the *Cohen* court reversed the Rule 12(b)(6) dismissal of the plaintiff's claims under RESPA, as well as her state law claims, which were contingent on the alleged RESPA violations. *Id.*

b) ***Sosa v. Chase Manhattan Mortgage Corp.*** **(11th Cir.2003)**

The Eleventh Circuit in *Sosa* addressed the district court's dismissal under Rule 12(b)(6) of the plaintiff's Section 8(b) 39 claims based on a $50 fee for courier services. 348 F.3d at 981. The plaintiff alleged that the defendant mortgage lender paid part of the $50 fee to a courier services for work performed, but retained the rest of the fee although it did not make any deliveries itself. *Id.* The *Sosa* court initially considered the history of Section 8, noting that the RESPA Senate Report indicated an intent to curtail kickbacks as well as fees for which no services were provided. *Id.* The court then discussed the structure of Section 8, noting that Section 8(a), which prohibits referral fee arrangements, and 8(b), which "attempts

to close any loopholes" by precluding fees except for services actually performed, combine to "create a broad prohibition against fees that serve solely to increase the cost of settlements to consumers." *Id.* at 982. Based on these factors, the *Sosa* court rejected the district court's conclusion that Section 8(b) can only be violated when two culpable parties split an unearned fee, rejecting the Fourth and Seventh Circuit's holdings in *Boulware* and *Krzalic*. *Id.* at 982. The *Sosa* court held that the phrase "[n]o person shall give and no person shall receive" allows for *either* a giver *or* a receiver of unearned settlement service fees to be liable under Section 8(b). *Id.* Further, the court rejected the conclusion that allowing an action against a single entity under Section 8(b) would cause the absurd result that a borrower could be liable under the act. The *Sosa* court held that a borrower/consumer will *always,* absent some connivance, pay settlement service fees with the intent that those fees actually be used for the service charged. *Id.* In this case, although the acceptor might be liable for accepting an unearned fee, the borrower/giver of the fee would not be liable because he or she would not have given the fee for unearned services. *Id.* Finally, as noted above, the *Sosa* court found just the opposite-that requiring two culpable parties for a Section 8(b) violation could produce the absurd result that if a service provider offered a prohibited unearned fee, but the offeree refused to accept the fee, then the service provider could not be liable because there were not two culpable parties. *Id.*

However, despite its disagreement with the district court's conclusion as to whether a single party can violate Section 8(b), the *Sosa* court nonetheless

upheld the dismissal of the plaintiff's claims. "What [was] missing [was] an allegation that the portion of the charge that [the lender] retained was accepted 'other than for services actually performed,' i.e., that [the lender] performed *no services* that would justify its retention of a portion of the fee." *Id.* at 983. In other words, because the lender had "benefitted the [plaintiff] by arranging for third party contractors to perform the deliveries," which in itself constituted some service rendered, its retention of the extra portion of the $50 fee was not entirely unearned. *Id.* at 984.

c) ***Santiago v.GMAC Mortgage Grp.*** **(3rd Cir.2005)**

Finally, the Third Circuit in *Santiago* addressed the plaintiff's claims under Section 8(b) based on alleged mark-ups of tax services and flood certification fees charged by the defendant lender for third-party services, as well as an alleged overcharge for a "funding fee." 417 F.3d at 385. The district court dismissed the plaintiff's claims under Rule 12(b)(6), finding that Section 8(b) only applies to kickbacks and referrals. *Id.* The *Santiago* court upheld the dismissal of the overcharge claims, finding that Section 8(b) plainly does not provide a cause of action for overcharges. *Id.* at 387.

However, as to the mark-up claims, the *Santiago* court held that the language "[n]o person shall give and no person shall receive" is ambiguous in terms of whether an undivided, unearned mark-up may be actionable under Section 8(b). *Id.* at 388-89. However, the court found that the context of Section 8(b)

supports an action against a service provider who unilaterally marks up the costs of third-party services and retains the extra portion of the fee. *Id.* at 389. Specifically, the *Santiago* court noted that the title of Section 8 as a whole is "Prohibitions against kickbacks and unearned fees"; the title of Section 8(a), which prohibits acceptance of "any fee, kickback, or thing of value," is "Business referrals"; and the title of Section 8(b), which prohibits the acceptance of "any portion, split, or percentage of any charge," is "Splitting charges." *Id.* (citing Section 8). Given this context, the *Santiago* court held that if Section 8(b) were applied only to multiple party kickback scenarios, that would render Section 8(a), which specifically applies to kickbacks, redundant. *Id.* As such, the court held that "a reading of Section 8(b) that allows a cause of action for [unilateral] markups is consistent with the title of Section 8 that prohibits both kickbacks and unearned fees." *Id.* Accordingly, the *Santiago* court remanded the case for further proceedings to determine whether the alleged markups charged by the lender defendants were truly nominal, or whether they were charged for some additional services performed by the lenders. *Id.*

ii) The Circuits that have not Allowed Claims for Undivided Fees

The Court's discussion thus far has already indicated the position and to some extent the analysis of those circuit courts that have-unlike the *Cohen, Sosa,* and *Santiago* courts-*rejected* the applicability of Section 8(b) to claims based on undivided fees. However, a brief review of these cases and their holdings will more clearly delineate the circuit split as it exists after the 2001 HUD SOP.

The first appellate court to conclude that Section 8(b) violations require some form of divided or shared fee was the Fourth Circuit in *Boulware*. The plaintiff in *Boulware* alleged that she was charged $65 for a credit report during her loan closing, but that the credit report only cost $15 or less to obtain, and the defendant lender retained the extra $50 without performing any additional services (i.e. a mark-up fee).[12] 291 F.3d at 264. The district court dismissed her claims and putative class claims under Rule 12(b)(6), as well as the Seventh Circuit's decision in *Echevarria*. *Id.* The *Boulware* court characterized the plaintiffs' action as "claims that [Section] 8(b) ... is a broad price control statute prohibiting any overcharge for credit reports." *Id.* at 263. However, the *Boulware* court held that "[t] he plain language of [Section] 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and ... is not a broad price-control provision." *Id.* at 265. Further, the court held that "[b]y using the language 'portion, split, or percentage,' Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge." *Id.* Thus, "the presence of an overcharge alone, without any portion of the overcharge being kicked back to or split with a third party, is not sufficient to fall within the purview of [Section] 8(b)." *Id.* at n. 3. Finally, the *Boulware* court refused to give any deference to the 2001 HUD SOP or Regulation X in the face of the

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[12] Despite the fact that the *Boulware* court spoke in terms of "overcharge" claims, the plaintiff's allegations were actually for an improper mark-up as described above, because the plaintiff did not allege that the credit reporting agency or any other third party received any payment from the defendant lender beyond that owed for the services actually performed. *Id.*

unambiguous language of the statute. *Id.* at 267. Likewise, and in response to the plaintiffs' legislative history/intent argument, the *Boulware* court held that "[n]othing in § 2601 [the RESPA statement of purpose] indicates that [Section] 8 was intended to eliminate all settlement service overcharges," and that instead RESPA was meant only to "prohibit all kickback and referral fee arrangements." *Id.* at 268.

The next circuit opinion to address the applicability of Section 8(b) to undivided fees was the Seventh Circuit's decision in *Krzalic,* which was authored by Judge Posner. The putative class plaintiffs in *Krzalic* alleged that the closing agent in the purchase of their homes charged a $50 fee for mortgage recording, but only paid the county record $36, with the extra $14 retained as a charge other than for services actually performed in violation of Section 8(b) (i.e. mark-up fees). 314 F.3d at 877. Initially, the *Krzalic* court cited *Boulware* as well as its own earlier decision in *Echevarria,* which held that a Section 8(b) violation requires some kickback or two-party fee splitting scheme, and noted that the plaintiffs had not alleged any such divided fee. *Id.* Next, the *Krzalic* court noted that in response to *Echevarria,* HUD issued the 2001 HUD SOP, which purportedly clarified the agency's previously ambiguous position, disagreed with the *Echevarria* court's conclusion, and expressly provided HUD's view that Section 8(b) violations are not "limited to situations where at least two persons split or share an unearned fee." *Id.* (citing the 2001 HUD SOP). Despite the clarification in the 2001 HUD SOP, the *Krzalic* court reaffirmed its holding in *Echevarria* that the plain language of Section 8(b) requires that the

challenged fee be split by at least two parties. *Id.* at 879-880. As such, the *Krzalic* court refused to give any deference to the 2001 HUD SOP, both because the agency statement was unreasonable in the face of Section 8(b)'s unambiguous language and because the 2001 HUD SOP was not the result of any formal notice and comment rulemaking sufficient to trigger *Chevron* deference.

Finally, the Eighth Circuit next took up the issue in *Haug*, which involved putative class claims under Section 8(b) based on settlement service charges for credit reports and other loan services that exceeded the defendant lenders' actual costs for those services. 317 F.3d at 834. The district court denied the defendants' motion to dismiss for failure to state a claim, and the defendants took an interlocutory appeal. *Id.* at 835. The *Haug* court held that Section 8(b) "is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute." *Id.* at 836 (citing *Boulware* and *Echevarria*). Also, the *Haug* court held that "[b]ecause the plain language of Section 8(b) unambiguously requires the giving or receiving of an unearned portion of a settlement fee," the 2001 HUD SOP should not be afforded any deference with respect to its conclusions contrary to the plain language of the statute. *Id.* at 838.

iii) The Fifth Circuit's Lone Statement on Section 8(b)

The Fifth Circuit has not directly addressed the circuit-split outlined above, but has hinted at a position on the issue. In *Knighton v. Merscorp Inc.*, the

Fifth Circuit addressed the district court's dismissal of an MDL based on the plaintiffs' claims that a small fee charged by mortgage lenders, which was then paid to the defendants, violated Section 8(b). 304 Fed. Appx. 285, 286 (5th Cir.2008). The defendants in *Knighton* acted as the permanent mortgagee of record in public land records for multiple loans, which allowed for rights to the various loans to be bought and sold without requiring changes to the land records. *Id.* Amongst other RESPA claims, the plaintiffs alleged that the fee paid to the defendants violated Section 8(b) because the services the defendant company performed as permanent mortgagee in exchange for the fee did not benefit the borrower. *Id.* at 288. The Fifth Circuit considered three separate questions in determining whether dismissal of the plaintiffs' Section 8(b) claims was proper: "(1) was the ... fee a settlement service; (2) **does Section 2607(b) apply to undivided fees;** and (3) were services actually performed?" *Id.* (emphasis added). The *Knighton* court held with respect to the first question that "what [Section 8(b)] prohibits is charging a fee for a settlement service that is not performed." *Id.* With respect to the third question, the court held that "[t]he statute clearly states that the charges cannot be paid other than for services actually performed, but nothing in it implies that the services must benefit the borrower." *Id.* Further, the Fifth Circuit argued that the fee at issue could be construed to benefit borrowers in that the fee facilitates securitization of mortgage loans, which in turn allows more borrowers to obtain such loans. *Id.* Finally, as to the second question, which constitutes the heart of the circuit split, the Fifth Circuit noted that "[t]he statutory language

refers to a split fee or the payment of a percentage of a fee [but] **does not mention undivided fees.**" *Id.* Nonetheless, the *Knighton* court recognized that the *Cohen* court had approved application of Section 8(b) to undivided fees, but in the end refused to analyze the issue on its own. *Id.* Rather, "because the fee was paid in exchange for a service that was actually performed," the *Knighton* court upheld the dismissal.

Furthermore, district courts in the Fifth Circuit have found the reasoning of *Boulware, Haug,* and *Echevarria* persuasive on the issue of whether Section 8(b) requires an allegation of division of the challenged fee. See, e.g., *Patino v. Lawyers Title Ins. Corp.,* 2007 WL 4687748, *5 (N.D.Tex. Jan.11, 2007); *Mims v. Stewart Title Guar.* Co.,521 F.Supp.2d 568, 572 (N.D.Tex.2007). Nonetheless, these courts allowed plaintiffs' claims to proceed beyond Rule 12(b)(6) dismissal due to allegations that the challenged fees had in fact been split.

iv) Pending Appeal Before the 11th Circuit in *Wooten v. Quicken Loans, Inc.*

As noted by the parties, the Southern District of Alabama addressed claims identical to those alleged against Quicken in this case with respect to loan discount fees. Specifically, the plaintiffs in *Wooten* alleged that they entered into loans for which they paid discount fees, or points, without any corresponding discount in their interest rates. 2008 WL 687379 at * 1. In *Wooten,* Quicken filed a motion dismiss under Rule 12(b)(6) based on its arguments that (1) the plaintiffs did not allege any split of the discount fee and (2) loan discount fees are not

"settlement services" within the ambit of Section 8(b). *Id.* The plaintiffs argued that the Eleventh Circuit's ruling in Sosa held that a single party can violate Section 8(b). *Id.* Further, the plaintiffs argued that the definition of settlement services under RESPA was amended in 1992 to include loan discount fees. *Id.* at *5.

The *Wooten* court first addressed the issue of whether a single party can violate Section 8(b). The court held that "*Sosa* [does not stand] for the proposition that an unsplit fee, like the one involved ... in the instant case, can violate section 8(b) of RESPA." *Id.* at *3. First, the *Wooten* court noted that Section 8(b) is entitled "Splitting charges," which "clearly contemplates two actors and the division of a fee and does not regulate the amount that one provider may charge." *Id.* (citing *Boulware* and *Haug*). Furthermore, the court distinguished the fees at issue in *Sosa* from the discount fees charged by Quicken. Specifically, the *Wooten* court noted that *Sosa* involved an alleged fee mark-up, in which the lender marked up the charge for third-party services and retained the mark-up itself. *Id.* at *2. While the *Wooten* court recognized the statement in *Sosa* that a single service provider can violate Section 8(b) by marking up third-party fees, the court also noted that a mark-up scenario *still requires a two-party splitting of fees,* even if only one party (i.e. the lender) is reaping any excess benefit from the mark-up. *Id.* In contrast, the plaintiffs' claims in *Wooten* alleged merely that Quicken and Quicken alone charged an improper fee without rendering any services. *Id.* at 4. The *Wooten* court noted the array of cases that have held that "RESPA is not a price-control act and does not forbid lenders from receiving

excessive charges for the services they provide." *Id.* at 3 (citations omitted). As such, the *Wooten* court held that the plaintiffs' claims that they allegedly received their loans at a higher rate than they should have was not actionable under Section 8(b). *Id.* at 4. Finally, the *Wooten* court rejected the plaintiffs' arguments under the 2001 HUD SOP, noting that "[t]his policy statement has been rejected by a number of courts as contrary to the plain language of Section 8(b)." *Id.* (citing *Santiago, Kruse, Krzalic,* and *Boulware*).

Furthermore, even if an unsplit fee were actionable, the *Wooten* court held that the loan discount fees at the basis of the plaintiffs' claims do not constitute "settlement services" under RESPA. *Id.* Quoting the RESPA definition of "settlement services," the *Wooten* court noted that every example in the definition refers to *actual services* as opposed to an *agreement* to lower interest rates. *Id.* The *Wooten* court also rejected the plaintiffs' argument that the 1992 RESPA amendments, which were enacted in part to expressly include loan origination as a settlement services under RESPA, also cover loan discount fees. *Id.* at *5. The court found that the inclusion of loan origination as a settlement service did not change the definition's requirement that only *service,* not the substantive terms of a loan such as interest rate, are governed by RESPA. *Id.*

As of this date, the *Wooten* decision remains pending on appeal to the Eleventh Circuit in *Wooten et al v. Quicken Loans, Inc.,* Appeal no. 08-11245 (11th Cir.2008).

C. The Plaintiffs' Claims

As an initial matter, the Plaintiffs in this case allege RESPA violations with respect to two, possibly three, types of fees charged by Quicken and/or Title Source:

> (1) **unearned, undivided loan discount fees** charged by Quicken, for which the Plaintiffs allege they received no corresponding services or value;
>
> (2) **split appraisal fees,** which the Plaintiffs allege were charged by and improperly split between Quicken and Title Source;
>
> (3) with respect to the Smiths, **unearned, undivided loan origination** and **loan processing fees,** which the Smiths allege were charged by Quicken for no, nominal, or duplicative work. The Smiths base their claims on the description of the challenged fees in their HUD-1 Settlement Statement. However, as noted earlier, Quicken has presented affidavit testimony that the origination and processing fees listed in the Smiths statement were in fact loan discount fees. Either way, the Smiths allege that the fees were unearned, undivided fees charged in violation of Section 8(b).

Furthermore, and as noted earlier, the Plaintiffs' state law contract claims are contingent on the validity of their RESPA claims. As such, the Court will address the propriety of summary judgment as to the

Plaintiffs' RESPA claims for each of the three alleged fee types.

(1) Loan Discount Fee Claims

The Plaintiffs' claims based on the allegedly unearned, undivided loan discount fees charged by Quicken come in the teeth of the circuit split discussed above. As an initial matter, the Court finds the circuit decisions that have held that Section 8(b) only applies to divided fees to be correct in terms of the plain language of the statute. In other words, the Court agrees that the plain language of Section 8(b) of RESPA *requires* an allegation that the challenged fees have been split in some fashion. Given this finding, the contrary provisions of Regulation X and the 2001 HUD SOP are not entitled to any deference under the principles of *Chevron*. *Chevron* requires that a court must determine "whether Congress has directly spoken to the precise question at issue," for if congressional intent is clear, both "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As a result, this Court finds the reasoning of the circuit decisions that have *rejected* claims for unearned and/or undivided fees-*Boulware, Echevarria, Krzalic,* and *Haug*-to be the more well-reasoned decisions on this issue, and agrees with the other district courts in this circuit-*Patino* and *Mims*-that have sided with those decisions in denying claims under Section 8(b) based on undivided fees. Additionally, the Court takes counsel from the Fifth Circuit's acknowledgment in *Knighton* that "the statutory language [of Section 8(b)] refers to

a split fee or the payment of a percentage of a fee **[but] does not mention undivided fees."** *Knighton,* 304 Fed. Appx. at 288. Accordingly, the Plaintiffs claims based on the loan discount fees charged by Quicken should be dismissed on summary judgment because Quicken is entitled to judgment as a matter of law.

(2) Split Appraisal Fees

The Plaintiffs' claims based on the appraisal fees allegedly split between Quicken and Title Source are not, at least on their face, implicated in the circuit split.[13] Rather, these claims simply allege that Quicken charged an appraisal fee for services provided by Title Source, in excess of the actual costs of those services, which it then split with Title Source. However, both Quicken and Title Source have presented affidavits in support of their motion for summary judgement [sic] that plainly show that the appraisal fees were not split

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[13] To the extent that the Plaintiffs' complaint may be read to include a claim that Title Source unilaterally retained the appraisal fee without providing any services in return for that fee, the Plaintiffs have not addressed that claim in response to Quicken and Title Source's motions for summary judgment, and thus the claim has apparently been abandoned. Regardless, the Eisenshtadt Affidavit unequivocally proves that Title Source did in fact render some appraisal services in return for the fee charged, and the Plaintiffs have not refuted that fact. As such, to the extent that Plaintiffs have alleged that the appraisal fee was an unearned, undivided fee retained by Title Source, that claim has either been abandoned, or should be dismissed on summary judgment. "Crudely put, Section 8(b) addresses the practice of being paid *at all* for doing *nothing*, not the practice of being paid *too much* for doing *something*." *Morrisette v. NovaStar Home Mortg., Inc.*, 484 F.Supp.2d 1227, 1230 (S.D.Ala.2007).

between Quicken and Title Source. In response to this unequivocal summary judgment evidence, the Plaintiffs have simply presented evidence of a business relationship between Quicken and Title Source that they argue somehow *suggests* the appraisal fees were in fact split. This merely oblique suggestion of a possible business relationship between Quicken and Title Source does not refute the direct summary judgment evidence that indicates the appraisal fees were not shared between Quicken and Title Source.

Finally, to the extent the Plaintiffs seek additional time to conduct discovery on the issue of whether the appraisal fee may have been split between Quicken and Title Source, the request is governed by Rule 56(f) of the Federal Rules of Civil Procedure. This rule provides that "[i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," the court may deny the motion, continue the motion to allow further discovery, or issue any other just order. Fed. R. Civ. Proc. 56(f). While the Plaintiffs have requested additional discovery in their Statement of Material Facts, they have not done so by affidavit in accordance with Rule 56(f). Further, the request in the Statement of Contested facts does not "demonstrate how postponement and additional discovery will allow [them] to defeat summary judgment," especially in light of the unequivocal affidavit testimony on this issue submitted by Quicken and Title Source. See *Stearns Airport Equip. Co. v. FMC Corp.*, 1710 F.3d 518, 534-35 (5th Cir.1999). As such, the Plaintiffs' request for additional discovery should be denied, and Quicken and Title Source's motion for summary

judgment should be granted as to the Plaintiffs' claims based on the appraisal fees.

(3) The Smiths' Origination/Processing Fees

Whether the fees charged to the Smiths were loan origination and processing fees, or were in fact loan discount fees, may in and of itself constitute a question of fact.[14] Nonetheless, and regardless of whether the fee was a loan origination and processing fee or a discount fee as with the Freemans and Bennetts, the Smiths' claim is based on an allegation that the fee was an unearned, undivided fee charged by Quicken in violation of Section 8(b). Thus, whether the fee was an origination and processing fee or a discount fee, the same analysis discussed above with respect to the Plaintiffs' claims regarding unearned, undivided loan discount fees charged by Quicken applies, and Quicken's motion for summary judgment On these claims should be granted.

D. The Plaintiffs' Louisiana Contract Claims

In light of the discussion above, and given the invalidity of the Plaintiffs' Section 8(b) claims, Plaintiffs' claims against Quicken and Title Source for breach of contract fail along with their RESPA claims,

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[14] Specifically, the Smiths' HUD-1 Settlement Statement lists the $5,107.44 fee that they are currently challenging as a loan origination fee. However, in support of its summary judgment motion, Quicken presents an affidavit indicating that the $5,107.44 fee was in fact a loan discount fee.

and thus Quicken and Title Source's motions regarding those claims should be granted.

E. The Plaintiffs' Claims for Payment of a Thing Not Owed and Unjust Enrichment

As for the Plaintiffs' quasi-contractual claims under Louisiana law, the Court again finds that the failure of Plaintiffs' claims under Section 8(b) of RESPA requires the dismissal of any Louisiana claims for unjust enrichment and payment of a thing not owed. Accordingly,

IT IS ORDERED that Quicken and Title Source's **Motions for Summary Judgment (Rec. Docs. 29 & 31)** are hereby **GRANTED.**

IT IS FURTHER ORDERED in light of the above ruling that Plaintiffs' claims are hereby **DISMISSED WITH PREJUDICE.**

APPENDIX C

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

Real Estate Settlement Procedures Act

Statement of Policy 2001–1:

Clarification of Statement of Policy

1999–1 Regarding Lender Payments to

Mortgage Brokers, and Guidance

Concerning Unearned Fees Under

Section 8(b)

* * *

Part C. Section 8(b) Unearned Fees

A. Background

RESPA was enacted in 1974 to provide consumers "greater and more timely information on the nature of the costs of the [real estate] settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices * * *" 12 U.S.C. 2601.

Since RESPA was enacted, HUD has interpreted Section 8(b) as prohibiting any person from giving or

accepting any unearned fees, i.e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed. Payments that are unearned fees for settlement services occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In the first situation, two settlement service providers split or share a fee charged to a consumer and at least part, if not all, of at least one provider's share of the fee is unearned. In the second situation, a settlement service provider charges a fee to a consumer for another provider's services that is higher than the actual price of such services, and keeps the difference without performing any actual, necessary, and distinct services to justify the additional charge. In the third situation, one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider, and for this reason the fee or any portion thereof for which services are not performed is unearned.

HUD regards all of these situations as legally indistinguishable, in that they involve payments for

settlement services where all or a portion of the fees are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.

As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

B. HUD's Guidance and Regulations

HUD guidance and regulations have consistently interpreted Section 8 as prohibiting all unearned fees. In 1976, HUD issued a Settlement Costs Booklet that provided that "[i] t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 FR 20289 (May 17, 1976). Between 1976 and 1992, HUD indicated in informal opinions that unearned fees occur where there are excessive fees charged, regardless of the number of settlement service providers involved.[1]

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[1] *See* e.g., Old Informal Opinion (6), August 16, 1976 and Old Informal Opinion (65), April 4, 1980; Barron and Berenson, *Federal Regulation of Real Estate and Mortgage Lending*, (4th Ed.1998). On November 2, 1992 (57 F.R. 49600), when HUD issued revisions to its RESPA regulations, it withdrew all of its informal counsel opinions and staff interpretations issued before that date. The 1992 rule provided, however, that courts and

In the preamble to HUD's 1992 final rule revising Regulation X (57 FR 49600 (November 2, 1992)), HUD stated: "Section 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992).

HUD's regulations, published on November 2, 1992, implement Section 8(b). Section 3500.14(c)[2] provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually

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administrative agencies could use HUD's previous opinions to determine the validity of conduct occurring under the previous version of Regulation X. See 24 CFR 3500.4(c).

[2] The heading to 24 CFR 3500.14 is titled "Prohibition against kickbacks and unearned fees." However, the heading of subsection (c) is titled "split of charges," and the preamble to the November 1992 rule states "[s]ection 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992). The rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text. As discussed in Section D of this Statement of Policy, HUD believes that the actual text of the rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one settlement service provider is involved.

> performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 CFR 3500.14(g)(2) states in part:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation.

24 CFR 3500.14(g)(3) provides in part:

> When a person in a position to refer settlement service business * * * receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.

In Appendix B to the HUD RESPA regulations, HUD provides illustrations of the requirements of RESPA. Comment 3 states in part:

> The payment of a commission or portion of the * * * premium * * * or receipt of a portion of the payment * * * where no substantial services are being performed * * * is a violation of Section 8 of RESPA. It makes no difference whether the payment comes from [the settlement service provider] or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here [the real estate broker in the example] is being compensated for a referral of business to [the title company].

In 1996, in the preamble to the final rule on the Withdrawal of Employer/ Employee and Computer Loan Origination Systems Exemptions[3] (61 FR 29238 (June 7, 1996)), HUD reiterated its interpretation of Section 8(b) of RESPA as follows:

> HUD believes that Section 8(b) of the statute and the legislative history make clear that no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. The provisions of Section 8(b) could apply in a number of situations: (1) where one settlement service provider receives an unearned fee from

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[3] This final rule was delayed by legislation, but the Department implemented portions of the final rule that were not affected by the legislative delay on November 15, 1996. 61 FR 58472 (November 15, 1996).

> another provider; (2) where one settlement service provider charges the consumer for third-party services and retains an unearned fee from the payment received; or (3) where one settlement service provider accepts a portion of a charge (including 100% of the charge) for other than services actually performed. The interpretation urged [by the commenters to the proposed rule published on July 21, 1994], that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another, is an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers. The Secretary, charged by statute with interpreting RESPA, interprets Section 8(b) to mean that two persons are not required for the provision to be violated. 61 FR 29249.

The latest revision to the Settlement Costs Booklet for consumers, issued in 1997, also provides "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 FR 31998 (June 11, 1997).

Further, HUD has provided information to the public and the mortgage industry in the "Frequently Asked Questions" section of its RESPA Web site, located at *<http://www.hud.gov/fha/sfh/res/resindus.html>*. Question 25 states:

> Can a lender collect from the borrower an appraisal fee of $200, listing the fee as such on

> the HUD–1, yet pay an independent appraiser $175 and collect the $25 difference?

The answer reads:

> No, the lender may only collect $175 as the actual charge. It is a violation of Section 8(b) for any person to accept a split of a fee where services are not performed.

In 1999, by letter submitted at the request of the Superior Court of California, Los Angeles County, in the case of *Brown v. Washington Mutual Bank* (Case No. BC192874), HUD provided the following response to a specific question posed by the court on lender "markups" of another settlement service provider's fees:

> A lender that purchases third party vendor services for purposes of closing a federally related mortgage loan may not, under RESPA, mark up the third party vendor fees for purposes of making a profit. HUD has consistently advised that where lenders or others charge consumers marked-up prices for services performed by the third party providers without performing additional services, such charges constitute "splits of fees" or "unearned fees" in violation of Section 8(b) of RESPA.

HUD noted in its letter to the court that the response reflected the Department's long-standing position.

C. Recent Cases

Notwithstanding HUD's regulations and other guidance, the Court of Appeals for the Seventh Circuit held, in *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), that Section 8(b) was not violated where a title company, without performing any additional services, charged the plaintiffs more money than was required by the recorder's office to record a deed and the title company then retained the difference. The court reasoned that plaintiffs "failed to plead facts tending to show that Chicago Title illegally shared fees with the Cook County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under [RESPA § 8(b)]." Id. at 626. The court in essence concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b).

Earlier, in *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306 (M.D. Ala. 1998), cited by the Seventh Circuit in support of its conclusion, the district court concluded that 24 CFR 3500.14(c), "[w]hen read as a whole," prohibits payments for which no services are performed "only if those payments are split with another party." Id. at 1309. The *Willis* court held that there must be a split of a charge between a settlement service provider and a third party to establish a violation Section 8(b). The court also concluded that 24 CFR 3500.14(g)(3) only applied when there was a payment from a lender to a

broker, or vice versa. The payment from a borrower to a mortgage lender could not be the basis for a violation of 24 CFR 3500.14(g)(3) and Section 8(b).

HUD was not a party to the cases and disagrees with these judicial interpretations of Section 8(b) which it regards as inconsistent with HUD's regulations and HUD's long-standing interpretations of Section 8(b).

D. Unearned Fees Under Section 8(b)

This Statement of Policy reaffirms HUD's existing, long-standing interpretation of Section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges. 12 U.S.C. 2601(a).

It is HUD's position that Section 8(b) proscribes the acceptance of any portion or part of a charge other than for services actually performed. Inasmuch as Section 8(b)'s proscription against "any portion, split, or percentage" of an unearned charge for settlement

services is written in the disjunctive, the prohibition is not limited to a split. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service— including up to 100%—that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person. Simply put, given that Section 8(b) proscribes unearned portions or percentages as well as splits, HUD does not regard the provision as restricting only fee splitting among settlement service providers. Further, since Section 8(b) on its face prohibits the giving or accepting of an unearned fee by any person, and 24 CFR 3500.14(c) speaks of a charge by "a person," it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.[4]

A settlement service provider may not levy an additional charge upon a borrower for another settlement service provider's services without providing additional services that are bona fide and justify the increased charge. Accordingly, a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct services provided to justify the charge. 24 CFR 3500.14(g)(3).[5]

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[4] HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees, because a consumer's intent is to make payment for services, not an unearned fee.

[5] HUD notes that some lenders have charged an additional fee merely for "reviewing" another settlement service provider's services. HUD does not regard such "review" as

The HUD regulation implementing Section 8(b) states: "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section." 24 CFR 3500.14 (c).

The regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute. 24 CFR 3000.14(c). A single service provider is also prohibited from charging a duplicative fee. Further, a single service provider cannot serve in two capacities, e.g., a title agent and closing attorney, and be paid twice for the same service. The fee the service provider would be receiving in this case is duplicative under 24 CFR 3000.14(c) and not necessary and distinct under 24 CFR 3000.14(g)(3). Clearly, in all of these instances, the source of the payment—whether from consumers, other settlement service providers, or other third parties—is not relevant in determining whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer. See 24 CFR 3500.14(c). Therefore, a single settlement service provider violates Section 8(b) whenever it receives an unearned fee.

A single service provider also may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided. HUD's regulations as noted state: "If the payment of a thing of value bears no relationship to the goods or services provided, then the excess is not

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constituting an actual, necessary, or distinct additional service permissible under HUD's regulations.

for services or goods actually performed or provided." 24 CFR 3500.14(g)(2). Section 8(c)(2) only allows "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed," i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2).

The Secretary, therefore, interprets Section 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

OPPOSITION BRIEF

No. 10-1042

In The Supreme Court of the United States

TAMMY FORET FREEMAN *et al.*,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

When the evidence is undisputed that a lender rendered services for a loan discount fee that it charged, does Section 8(b) of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) prohibit the lender from collecting and retaining this fee?

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Quicken Loans Inc., discloses the following corporate affiliations:

Quicken Loans is owned by Rock Holdings Inc. Neither Quicken Loans nor Rock Holdings is a publicly held corporation, and no publicly held corporation owns ten percent or more of either of their stock.

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STATEMENT OF THE CASE

I. INTRODUCTORY STATEMENT

In 1974, Congress enacted the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, to reform the real estate settlement process to "insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."[1] The goal was to create "more effective advance disclosure to home buyers and sellers of settlement costs," to reduce "the amounts home buyers are required to place in escrow accounts" and to eliminate "kickbacks or referral fees" in connection with settlement services.[2] RESPA was not enacted to fix the prices of settlement services. *See Kuknyo v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) ("Congress considered and explicitly rejected a system of price controls for fees."); *see also Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 56-57 (2d Cir. 2004); S. REP. NO. 930866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6545, 6549-50 (Congress did not intend to use RESPA as a means of "fixing rates for real estate settlement charges[.]"). RESPA also was not

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[1] 12 U.S.C. § 2601(a).

[2] 12 U.S.C. § 2601(b).

enacted to regulate interest rates or the pricing of residential mortgage loans.

Section 8 of RESPA places two restrictions on settlement service charges. Section 8(a) provides that no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement to refer settlement service business.[3] Section 8(b) provides that no person shall give and no person shall accept any portion, split, or percentage of a settlement service charge other than for services actually rendered.[4]

In the instant case, Petitioners allege that Quicken Loans violated Section 8(b) by collecting loan discount fees without providing a specific reduction in their interest rates.[5] Petitioners claim these loan discount fees were unearned and that Section 8(b) prohibits fees for which no services are provided, even when those fees are not split or shared with another party.[6] On the summary judgment record in this case, it is undisputed, as a matter of fact, that the loan discount fees did not fall within the statute's reach. The fees were not divided; they were paid to and retained solely by Quicken Loans.[7] It is also

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[3] 12 U.S.C. § 2607(a).

[4] 12 U.S.C. § 2607(b).

[5] Petitioners' brief at p.6.

[6] Petitioners' brief at pp.19-20.

[7] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16. Citations to the record in this brief styled "R – USCA5" are

(Continued on following page)

undisputed, as a matter of fact, that the loan discount fees were a component of the pricing of the loans Petitioners received from Quicken Loans.[8] As required under the Truth in Lending Act, 12 U.S.C. § 1601 *et seq.*, and RESPA, these fees and the related interest rates were disclosed to Petitioners well in advance of their loan closings to permit Petitioners to compare the costs of credit between various lenders.[9] After receiving the required disclosures, Petitioners chose to accept the extensions of credit, with all corresponding terms, offered by Quicken Loans.

Petitioners ask this Court to grant certiorari and to reverse the decisions of the district court and the Fifth Circuit upholding Quicken Loans' motions for summary judgment. To justify their petition, the Petitioners attempt to manufacture a "four to three"

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references to the record in *Freeman v. Quicken Loans*, No. 08-1626 (5th Cir.).

[8] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

[9] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 7; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 6 and 13.

circuit split by citing to Section 8(b) cases generally without regard to the type of claim at issue. As both Petitioners and the Fifth Circuit acknowledged, the only other circuit to determine whether Section 8(b) applies to unearned, undivided fees (as alleged by Petitioners) is the Second Circuit, *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007).[10] Thus, there is no entrenched circuit split that warrants this Court's review.

Additionally, this case does not present the factual predicate to resolve the question presented by Petitioners – whether Section 8(b) prohibits unearned, undivided settlement service charges – because the loan discount fees were not settlement service charges and there was undisputed summary judgment evidence that the fees were, in fact, earned.[11] Accordingly, Quicken Loans respectfully requests that this Court deny the Petition.

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[10] Appellants' Fifth Circuit brief at p.6; Pet. App. 6a; *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 802-03 (5th Cir. 2010).

[11] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

II. STATEMENT OF FACTS

A. The Loan Discount Fees Were a Component of Quicken Loans' Pricing of the Loans.

Petitioners each obtained a residential mortgage loan from Quicken Loans.[12] Petitioners each paid a loan discount fee to Quicken Loans that was fully disclosed prior to their loan closings.[13] The payment of these loan discount fees was a condition of and a prerequisite to each loan as well as a component of the pricing of the loan that Petitioners received.[14] The loan discount fees were paid solely to and retained by Quicken Loans.[15]

B. The Lawsuits and Quicken Loans' Motions for Summary Judgment.

Petitioners brought suit against Quicken Loans alleging several causes of action, including allegations that the loan discount fees violated Section 8(b). Section (8)(b) is entitled "Splitting Charges" and provides:

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[12] Petitioners' brief at p.6.

[13] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 7; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 6 and 13.

[14] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[15] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

(b) Splitting charges

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.[16]

Quicken Loans moved for summary judgment against each Petitioner and presented undisputed and uncontroverted evidence that: (a) it did not split the loan discount fees with anyone; (b) it solely received and retained the loan discount fees; and (c) it performed services for the loan discount fees because those fees were a condition of and a prerequisite to each loan as well as a component of the pricing of the loans that each Petitioner received.[17] Petitioners' opposition relied exclusively on the allegations in their complaints and legal arguments based on the closing documents.[18] They presented no affidavits or

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[16] 12 U.S.C. § 2607(b).

[17] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 7-9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7-9 and 14-16.

[18] *See* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 498, 500, 502-503, 539, 554, 577-578, and 582, Exhibits 7, 8, 9, 18, 21, 22, 30, and 32 to Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment.

other competent summary judgment evidence to contest Quicken Loans' evidence that the loan discount fees were a component of the pricing of and a condition of and prerequisite to their loans.

The district court granted Quicken Loans' motions for summary judgment and dismissed all claims asserted against it.[19] In a fifty-seven page opinion, the district court thoroughly analyzed all authority concerning the proper interpretation of Section 8(b) and held that the plain language of Section 8(b) "*requires* that the challenged fee have been split in some fashion" and that the loan discount fees could not violate Section 8(b).[20]

C. The Fifth Circuit Affirmed.

Petitioners argued on appeal that Section 8(b) does not require that the loan discount fees be split or otherwise shared with a third party.[21] They acknowledged that this was an issue of first impression in the Fifth Circuit and noted that "the only Circuit Court to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[22]

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[19] Pet. App. 19a-70a.

[20] Pet. App. 66a-67a (emphasis supplied).

[21] *See* Appellants' Fifth Circuit brief at p.6.

[22] *See id.*

The Fifth Circuit affirmed the district court, holding "that the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees."[23] Additionally, the Fifth Circuit stated that it did not have to reach the issue of whether a loan discount fee was a settlement service charge due to its disposition of the case based on the plain language of Section 8(b).[24] The Fifth Circuit also addressed and rejected, in *dicta*, Petitioners' argument that HUD Statement of Policy 2001-1[25] (which purported to interpret Section 8(b) more broadly) is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[26] Judge Higginbotham dissented.[27]

REASONS FOR DENYING THE PETITION

There is no entrenched circuit split on the issue presented to this Court – whether Section 8(b) prohibits allegedly unearned, undivided loan discount

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[23] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[24] Pet. App. 4a n.1; *see also Freeman*, 626 F.3d at 802 n.1.

[25] *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Fees Under Section 8(b)*, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

[26] Pet. App. 11a-14a; *see also Freeman*, 626 F.3d at 805-06.

[27] Pet. App. 15a-18a; *see also Freeman*, 626 F.3d at 806-08. Judge Higginbotham's dissent failed to consider the undisputed evidence that the loan discount fees were conditions of and prerequisites to each loan, as well as a component of the pricing of each loan.

fees. The "four to three" circuit split cited by Petitioners involves a factual circumstance that is not presented by the facts of the case at bar.[28] The cited cases concern markups of a third party's settlement service charges. *See Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 386 (3d Cir. 2005); *Kruse*, 383 F.3d at 57-58; *Weizeorick v. Republic Title Co.*, 337 F.3d 827, 829 (7th Cir. 2003); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 981 (11th Cir. 2003); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 834 (8th Cir. 2003); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 264 (4th Cir. 2002); *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 624-25 (7th Cir. 2001). This case, however, involves allegedly unearned, undivided loan discount fees paid entirely to, and retained by, a single person (Quicken Loans). As both Petitioners and the Fifth Circuit acknowledged, prior to the instant decision, "the only Circuit Court to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[29] There is far from an established circuit split on this narrow factual circumstance: two circuit court decisions in over thirty-five years of the existence of Section 8(b) does not warrant intervention by this Court.

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[28] Petitioners' brief at pp.12-16.

[29] Appellants' Fifth Circuit brief at p.6; *see also* Pet. App. 6a; *Freeman*, 626 F.3d at 802-03.

Further, no circuit has ever held that a loan discount fee violates Section 8(b). In fact, the Eleventh Circuit recently rejected this argument and held that loan discount fees are not settlement service charges under RESPA and cannot form the basis of a Section 8(b) violation. *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1189 (11th Cir. 2010). There was no dispute that the unearned, undivided fee addressed by the Second Circuit in *Cohen*, a so-called "post closing fee," was a settlement service charge subject to Section 8(b). *See* 498 F.3d at 113. Thus, the factual basis of Petitioners' claims is not substantially similar to that presented to the Second Circuit, and the Fifth Circuit's decision could be affirmed on other grounds without reaching the question presented.

Even if loan discount fees could be characterized as settlement service charges subject to Section 8(b), Petitioners failed to prove that the fees they paid were unearned, and so Section 8(b) was not implicated. In support of its motions for summary judgment, Quicken Loans submitted affidavits establishing that the loan discount fees were earned as a component of the pricing of Petitioners' loans.[30] Petitioners did not dispute this fact.[31] Thus, if anything,

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[30] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 8 and 15.

[31] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in

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Petitioners' complaint is that the loan discount fees they paid were too high, constituting an alleged overcharge. Circuit courts have universally rejected attempts to apply Section 8(b) to overcharges. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also, e.g., Martinez v. Wells Fargo Home Mortg. Inc.*, 598 F.3d 549, 553-54 (9th Cir. 2010) (noting the Second, Third and Eleventh Circuits have all held overcharges are not actionable and joining their conclusion); *Patino v. Lawyers Title Ins. Corp.*, No. 3:6-CV-1479-B, 2007 WL 4687748, at *3 (N.D. Tex. Jan. 11, 2007) (unpublished) (collecting cases).

Assuming *arguendo* that this case does involve unearned, undivided fees that are settlement service charges subject to Section 8(b), the question presented to this Court is not ripe for review for two reasons.

First, the Second Circuit in *Cohen* performed a cursory review of only one phrase of Section 8(b) before it found the statute ambiguous as to unearned, undivided fees. *See* 498 F.3d at 117-21. The Fifth Circuit is the only circuit to undertake a full analysis of the construction of the statute under the principles

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question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

espoused by this Court to determine whether Section 8(b) applies to unearned, undivided fees.[32] Based on this thorough analysis, the Fifth Circuit correctly held that Section 8(b) is unambiguous and does not apply to unearned, undivided fees.[33] If there is any conflict between the circuits, it is not mature and not deserving of this Court's attention.

Second, the Second Circuit decision in *Cohen* was decided on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, not summary judgment. *See* 498 F.3d at 114. Here, Quicken Loans presented evidence in support of its motions for summary judgment that the loan discount fees were earned; Petitioners presented no evidence to the contrary.[34] Thus, regardless of the language in Petitioners' application (or in the Fifth Circuit opinion), this case does not procedurally present a claim of an "unearned" fee.

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[32] Pet. App. 7a-11a; *Freeman*, 626 F.3d at 803-05.

[33] Pet. App. 7a-11a; *Freeman*, 626 F.3d at 803-05.

[34] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15. Petitioners' opposition was based solely on allegations and references to documents that did not refute Quicken Loans' evidence. *See* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts; R – USCA5 498, 500, 502-503, 539, 554, 577-578, and 582, Exhibits 7, 8, 9, 18, 21, 22, 30, and 32 to Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment.

Finally, review is not warranted to address the level of deference that should be afforded to HUD Statement of Policy 2001-1. This Court has clearly prescribed the appropriate analysis for determining when a court should defer to an agency interpretation of a statute it is charged with administering, and every circuit to perform this analysis has refused to defer to the policy statement to some extent. *See, e.g.*, *Martinez*, 598 F.3d at 554; *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1297 (11th Cir. 2008); *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56-57; *Haug*, 317 F.3d at 838-39; *Krzalic*, 314 F.3d at 881; *Boulware*, 291 F.3d at 267.

I. There Is No Entrenched Circuit Split on Unearned, Undivided Fees.

Circuit courts interpreting Section 8(b) have recognized four potential violations: (1) a split of an unearned fee between two parties; (2) an overcharge of a single fee paid to a single person that exceeds the reasonable value of the services provided; (3) an unearned markup of an earned fee; and (4) an unearned, undivided fee paid completely to a single person.

Circuit courts consistently recognize that Section 8(b) prohibits the first variety – a split of an unearned fee between two parties.[35] It is undisputed

[35] Pet. App. 5a (internal citation omitted); *Freeman*, 626 F.3d at 802 (same).

that there was no split of the loan discount fees at issue – they were paid to and retained solely by Quicken Loans.[36]

Circuit courts also agree that Section 8(b) does *not* prohibit an overcharge of a single fee paid to a single person. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez*, 598 F.3d at 553-54 (collecting cases). While Petitioners do not label their claim as an overcharge, the loan discount fees at issue can only fall into this category – for the essence of Petitioners' claim is that they allegedly paid more than was reasonably related to the services they received from Quicken Loans.

Petitioners correctly note that some courts are divided over whether an unearned markup of an earned settlement service fee that is retained by a single person violates Section 8(b).[37] It is undisputed, however, that the loan discount fees at issue were not markups.[38] Quicken Loans did not add an unearned fee to a fee earned by another settlement service provider.[39] The loan discount fees were paid to and

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[36] *See* Petitioners' brief at p.i; *see also* Pet. App. 2a ("This appeal concerns . . . 'unearned, *undivided* fees. . . .'") (emphasis supplied); *Freeman*, 626 F.3d at 801 (same).

[37] Petitioners' brief at pp.12-16.

[38] *See* Petitioners' brief at p.i; *see also* Pet. App. 2a; *Freeman*, 626 F.3d at 801 (same).

[39] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

retained solely by Quicken Loans.[40] Thus, the "four to three" circuit split cited by Petitioners is not a basis for granting review in this case.

All seven circuits involved in this alleged split addressed the applicability of Section 8(b) to *markups*, not unearned, undivided fees wholly paid to a single person. *See Santiago*, 417 F.3d at 389 (alleged markups of charges for tax and flood certification services states a Section 8(b) claim); *Kruse*, 383 F.3d at 57-58 (same re: alleged markups of fees for tax services, flood certifications and document preparation); *Sosa*, 348 F.3d at 983 (same re: alleged markup of a fee for courier services); *Haug*, 317 F.3d at 836 (alleged markups of credit report, appraisal, and document delivery services does not state a Section 8(b) claim); *Krzalic*, 314 F.3d at 879 (same re: alleged markup of recording fee); *Boulware*, 291 F.3d at 265 (same re: alleged markup of a credit report fee).

None of these cases involve claims of unearned, undivided fees paid to and retained by a single person, or a loan discount fee, or a factual finding following summary judgment. There is no "four to three" circuit split for this Court to resolve in this case.

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[40] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶ 9; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 9 and 16.

II. There Is Not a Circuit Split Because *Cohen* Is Distinguishable.

The more narrow issue presented to this Court is whether Section 8(b) prohibits allegedly unearned, undivided fees paid to a single person. As both Petitioners and the Fifth Circuit acknowledged, the only other circuit court "to address this very specific type of fee (i.e., an undivided, unearned fee) in the context of Section 8(b), is the Second Circuit in the *Cohen* case."[41] The differences between the Second Circuit's *Cohen* decision and the Fifth Circuit's decision here do not present a circuit split for this Court to resolve.

The plaintiff in *Cohen* claimed that her lender violated Section 8(b) by collecting an allegedly unearned, undivided "post-closing fee" in connection with the refinancing of her mortgage. 498 F.3d at 113. The district court dismissed Cohen's Section 8(b) claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6) because (i) the fee at issue was analogous to an "overcharge," which the Second Circuit held in *Kruse* was not prohibited by Section 8(b), and (ii) Cohen failed to plead that the allegedly unearned fee was split between two parties. *Id.* The Second Circuit disagreed. *Id.* It accepted as true the complaint's allegations that the fee was a settlement service charge and the lender provided no services for the "post-closing" fee and, based on these allegations,

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[41] *See* Appellants' Fifth Circuit brief at p.6; *see also* Pet. App. 6a; *Freeman*, 626 F.3d at 802-03.

concluded that Section 8(b) encompassed allegedly unearned, undivided fees when no third party is involved. *Id.* at 114, 126.

A. Unlike the "Post-Closing Fee" in *Cohen*, the Loan Discount Fees Paid by Petitioners Are Not Settlement Service Charges Subject to Section 8(b).

There is no circuit split between *Cohen* and this case because the fees at issue here were not paid for a settlement service. RESPA was enacted to provide consumers "with greater and more timely information on the nature and costs of the settlement process" and to protect consumers "from unnecessarily high settlement charges."[42] Accordingly, Section 8(b) only applies to a portion, split, or percentage of a charge made or received *for the rendering of a real estate settlement service*.[43] "Real estate settlement service" is defined by statute as "any service provided in connection with a real estate settlement."[44] A real estate "settlement" is "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called 'closing' or 'escrow' in different jurisdictions."[45] Thus, "settlement service

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[42] 12 U.S.C. § 2601(a).

[43] 12 U.S.C. § 2607(b) (emphasis supplied).

[44] 12 U.S.C. § 2602(3).

[45] 24 C.F.R. § 3500.2. The statute provides the following examples of "settlement services": "title searches, title examinations,

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charges" include typical charges paid by borrowers in connection with the closing of their loans, such as title work, inspections, and appraisals.[46]

Some fees charged by lenders are settlement service charges.[47] For example, the statute expressly includes services rendered in connection with the origination of a loan within this definition, such as the taking of loan applications, loan processing, and the underwriting and funding of loans.[48] These administrative services, provided by a lender so that the mortgage ultimately may be executed, are different from the actual *terms* of a loan. *See Wooten*, 626 F.3d at 1193-94; *Greenwald v. First Fed. Sav. & Loan Ass'n*, 446 F. Supp. 620, 625 (D. Mass. 1978). These terms include the interest rate. *Wooten*, 626 F.3d at 1193-94. A loan discount fee is not a "real estate settlement service" because it is part of the pricing of a loan, is related to the interest rate, and is not

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the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement." 12 U.S.C. § 2602(3).

[46] 24 C.F.R. § 3500.2.

[47] *Id.*

[48] *Id.*

charged for a "service" provided in connection with the execution of a mortgage.

The Eleventh Circuit held just that in *Wooten v. Quicken Loans, Inc.*, which, like this case, involved a loan discount fee. *Id.* at 1189. Specifically, the Eleventh Circuit ruled that a real estate settlement service "does not include the act of negotiating advance interest terms such as points" and that, therefore, loan discount fees cannot constitute real estate settlement services and cannot violate Section 8(b). *Id.* at 1193-94.

Hence, *Wooten* supports the Fifth Circuit's holding below (albeit on a different theory). After *Wooten*, there is no split with *Cohen* because the fees here do not implicate RESPA.

B. Even the Second Circuit Would Have Dismissed Petitioners' Claims.

There also is not a split because the different factual circumstances are what caused the Second and Fifth Circuits to reach purportedly different results. *Cohen* came to the Second Circuit on appeal from a judgment granting a motion to dismiss that required the well-pleaded allegations of the complaint to be accepted as true. *See* 498 F.3d at 114. Here, however, Quicken Loans filed motions for summary judgment and established on the merits that the loan discount fees were not split with another party and

were earned in exchange for the loans Petitioners received.[49] In support of its motions for summary judgment, Quicken Loans submitted competent summary judgment evidence in the form of affidavits demonstrating that the loan discount fees were earned.[50] Specifically, Quicken Loans' affiant attested that the loan discount fees were a component of the pricing of Petitioners' loans and were conditions of and prerequisites to the extensions of credit offered to Petitioners by Quicken Loans.[51] In response, Petitioners admitted that the loan discount fees were a component of the pricing of each loan.[52] Thus, the loan discount fees were *earned*. Section 8(b) does not provide a cause of action for *earned* fees. In contrast,

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[49] Pet. App. 66a-67a.

[50] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[51] *See* R – USCA5 253-255, Affidavit of Michael Lyon, ¶¶ 8 and 11; R – USCA5 316-319, Affidavit of Michael Lyon, ¶¶ 7, 8, 14, and 15.

[52] *Compare* R – USCA5 312-315, Statement of Uncontested Material Facts, ¶¶ 5 and 13, *with* R – USCA5 427-429, Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶¶ 5 and 13. The Smith Petitioners disputed this fact only because they claimed that the fee in question was not a loan discount fee. *Compare* R – USCA5 248-250, Statement of Uncontested Material Facts, ¶ 7, *with* R – USCA5 430-432, Smith Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts, ¶ 7. However, all Petitioners proceed here as if the fee at issue was a loan discount fee for which it is alleged no service was provided. Petitioners' brief at pp.2 and 6.

because of its immature procedural posture, *Cohen* came to the Second Circuit with the factual assumption that the fee at issue was unearned.

On this record (unlike *Cohen*), Petitioners' claim could only be one of an alleged overcharge – the loan discount fees exceeded the reasonable value of the services provided by Quicken Loans. *See Kruse*, 383 F.3d at 53 (defining overcharges). There is no circuit split in this regard, for every circuit addressing overcharges has held that overcharges are not actionable under Section 8(b), including the Second Circuit in *Cohen* and *Kruse* and the Eleventh Circuit in *Sosa*. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez*, 598 F.3d at 553-54 (collecting cases).

In sum, seven of the decisions on which Petitioners rely for the alleged circuit split involve claims of marked up settlement service charges at the pleading stage. None involves loan discount fees and none construes Section 8(b) to encompass overcharges. Moreover, the Second Circuit's decision in *Cohen*, which is the only decision addressing unearned, undivided fees, is distinguishable. Accordingly, the Court may leave for another day the issue of whether Section 8(b) applies to markups or undivided, unearned settlement service charges.

III. The Fifth Circuit Correctly Held that Section 8(b) Is Not Ambiguous.

Even though it was unnecessary for the Fifth Circuit to reach the issue, the court nonetheless addressed whether Section 8(b) applies to wholly unearned, undivided fees paid to a single person.[53] Based on the unambiguous language of the statute, the Fifth Circuit held Section 8(b) does not cover unearned, undivided fees, and its decision plainly was correct.[54] First, the court ruled that "the language 'No person shall give and no person shall accept' is not ambiguous as to whether a sole actor's undivided fees are covered. The term 'and' normally means that both of the listed conditions must be satisfied."[55] Thus, the Fifth Circuit held that the use of the conjunctive "and" in the proscription "no person shall give *and* no person shall receive" "indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act."[56] "Thus, the provision requires two parties each committing an act: one party gives a 'portion, split, or percentage,' and another party receives a 'portion, split, or percentage.' "[57]

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[53] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[54] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[55] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

[56] Pet. App. 7a (emphasis supplied) (citing *Boulware*, 291 F.3d at 266); *see also Freeman*, 626 F.3d at 803 (same).

[57] Pet. App. 7a (citing *Boulware*, 291 F.3d at 265); *see also Freeman*, 626 F.3d at 803 (same).

This interpretation is supported by the context of the phrase and the companion provision in Section 8(a). Section 8(a) contains the identical phrase in providing that "no person shall give *and* no person shall accept" kickbacks in exchange for the referral of settlement service business.[58] As the Fifth Circuit correctly held, Section 8(a) "clearly requires two culpable actors" and to "be consistent with RESPA § 8(a), RESPA § 8(b) should require two culpable actors as well."[59]

While the Second Circuit read the law differently, its reasons are not persuasive. In *Cohen*, the Second Circuit paid little attention to this key language of Section 8(b). Instead, the court referenced its prior decision in *Kruse* and summarily dispensed with the position ultimately adopted by the Fifth Circuit stating "we do not assume that a guilty giver and a guilty acceptor must participate in every unlawful unearned charge." *Cohen*, 498 F.3d at 120 (citing *Kruse*, 383 F.3d at 57-58). Even in its decision in *Kruse*, however, the Second Circuit did not evaluate the normal and plain meaning of the word "and." *See Kruse*, 383 F.3d at 57-58. Nor did it comply with this Court's instruction to follow "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *See Nat'l Credit Union Admin.*

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[58] 12 U.S.C. § 2607(a) (emphasis supplied).

[59] Pet. App. 7a; *see also Freeman*, 626 F.3d at 803.

v. First Nat. Bank & Trust Co., 522 U.S. 479, 501 (1998); *see also Ratzlaf v. United States*, 510 U.S. 135 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Instead, the Second Circuit ignored the context of the phrase within its companion provision, Section 8(a), and within Section 8 generally. The court surveyed other interpretations by other courts, without undertaking any independent analysis and, based on *dicta* by the Eleventh Circuit, held the word "and" does "not seem to compel" a particular reading and could plausibly be construed as not requiring a culpable giver and acceptor. *Kruse*, 383 F.3d at 57-58.

As to the second key phrase in Section 8(b), the terms "portion," "split" and "percentage" plainly refer to less than the whole of something.[60] Even the Second Circuit in *Cohen* agreed with the "ordinary meaning" of these nouns. *See* 498 F.3d at 117. Based on this "ordinary meaning," the Fifth Circuit held "'any portion, split or percentage' requires that two parties share something."[61]

In *Cohen*, the Second Circuit interpreted the word "any" in the phrase "any portion, split, or percentage" to result in a construction that is opposite to the "ordinary meaning" of these terms, namely that the use of "any" changes the meaning of the terms from "less than the whole of a fee" to "the whole fee."

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[60] Pet. App. 8a-9a; *see also Freeman*, 626 F.3d at 803-04.

[61] Pet. App. 11a; *see also Freeman*, 626 F.3d at 804.

See 498 F.3d at 117-18. As the Fifth Circuit correctly noted, "[a] court stretches the definition of 'portion, split or percentage' to its breaking point to mean 100% of a charge."[62] This type of unwarranted expansion of the terms "portion," "split" and "percentage" is exactly what this Court cautioned courts not to do through the cannon of *noscitur a sociis*. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). All three of the terms at issue mean less than the whole of something and the use of "any" does not result in the opposite effect.

The interpretation suggested by Petitioners also would make Section 8(b) a price-control mechanism – a result that Congress squarely rejected in enacting of the statute in 1974. "Congress considered and explicitly rejected a system of price controls for fees." *See Kuknyo*, 763 F.2d at 271; *see also Kruse*, 383 F.3d at 56-57. Congress did not intend to use RESPA as a means of "fixing rates for real estate settlement charges[.]"[63] This type of price fixing "would infringe on an area that has historically been of State or local concern and, in some instances, would duplicate

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[62] Pet. App. 9a; *see also Freeman*, 626 F.3d at 804. As the Fifth Circuit noted, the Second Circuit also improperly relied upon an expanded construction of "any portion" and "any percentage" in anti-embezzlement statutes when none of those statutes use the three terms included in Section 8(b) portion, *split* and percentage. *See* Pet. App. 9a-10a; *see also Freeman*, 626 F.3d at 803-04.

[63] *See* S. REP. NO. 930866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6545, 6549-50.

existing State regulatory schemes."[64] Petitioners' suggested interpretation of Section 8(b) would result in the exact type of price control mechanism that Congress refused to enact. Accordingly, Section 8(b) does not prohibit overcharges and does not prohibit unearned, undivided fees paid to and retained solely by a single person.

Because the Fifth Circuit concluded that Section 8(b) is unambiguous with respect to unearned, undivided fees, it did not defer to HUD Statement of Policy 2001-1. Instead, the Fifth Circuit specifically cited this Court's guidance and stated: "When the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement."[65] For this Court has long held that a "pure question of statutory construction" is for the courts to decide, and that the judiciary must reject agency interpretations of statutes that are contrary to clear congressional intent. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9).

For the sake of completeness, the Fifth Circuit reviewed HUD Statement of Policy 2001-1 and determined that it did not merit any deference.[66]

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[64] *Id.*

[65] Pet. App. 12a (citing *Chevron*, 467 U.S. at 842-43); *see also Freeman*, 626 F.3d at 805 (same).

[66] Pet. App. 12a-14a; *see also Freeman*, 626 F.3d at 805-06.

Although it was not essential to the decision in this case, the Fifth Circuit properly refused to defer to HUD Statement of Policy 2001-1 as it applies to "unearned, undivided fees."[67] That policy statement is simply an agency's interpretation of an unambiguous statutory provision. Moreover, HUD's statement cannot be considered to be a binding authority because it was issued as a commentary on a recent legal decision, without formal rulemaking or any substantial consideration, and is pervaded by considerations and theories that courts of appeal uniformly have held contradict the direct intent of Congress. *See Martinez*, 598 F.3d at 554; *Friedman*, 520 F.3d at 1297; *Santiago*, 417 F.3d at 387; *Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 56-57; *Haug*, 317 F.3d at 836, 838-39; *Krzalic*, 314 F.3d at 881; *Boulware*, 291 F.3d at 267. As this Court has instructed, an agency's interpretation of an ambiguous statute "may also receive substantial deference" under *Chevron* "only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

As the Fifth Circuit determined, HUD's view on the scope of Section 8(b), not its own regulations, is

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[67] Pet. App. 12a-14a; *see also Freeman*, 626 F.3d at 805-06.

not persuasive because it was "perfunctory and conclusory," lacked any concrete reasoning and identified no evidence for its claim that the statement was based on HUD's alleged long-standing interpretation.[68] Thus, the Fifth Circuit correctly rejected HUD's attempt to expand Section 8(b). *See Mead Corp.*, 533 U.S. at 235 (discussing an administrative ruling under a complex regulatory scheme and noting that "[s]uch a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.") (alteration added). Other circuits that have considered HUD Statement of Policy 2001-1 have rejected it as contrary to the clear text of § 8(b) and entitled to no deference. *See Santiago*, 417 F.3d at 387 ("[B]ecause the plain language of Section 8(b) does not provide for a cause of action for overcharges, it is not necessary for us to reach the question whether HUD's interpretation warrants deference."); *Kruse*, 383 F.3d at 57 ("[W]e cannot, and we therefore do not, defer to this reading of section 8(b) by HUD."); *Haug*, 317 F.3d at 839 ("*Chevron* deference . . . is not due here because we have held that Section 8(b) is unambiguous."); *Krzalic*, 314 F.3d at 881 ("There is not enough play in the statutory joints to allow HUD to impose its own 'interpretation' under the aegis of *Chevron*."); *Boulware*, 291 F.3d at 267 (no deference should be given to HUD because "the text of the statute controls in this case.").

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[68] Pet. App. 13a; *see also Freeman*, 626 F.3d at 806.

IV. The Level of Deference Afforded HUD Statement of Policy 2001-1 Is Not an Independent Basis for Granting Certiorari in this Case.

Petitioners contend that the Court should grant review "to resolve a broader circuit conflict over the *Chevron* status" of HUD Statement of Policy 2001-1 and "similar informal agency interpretations issued in a variety of settings."[69] HUD Statement of Policy 2001-1, however, has no bearing on Petitioners' claims because the loan discount fees they paid are not subject to Section 8(b) – they are not settlement services and are not unearned fees. Further, every circuit to consider HUD Statement of Policy 2001-1 has refused to defer to it in its entirety; no circuit has agreed with HUD that Section 8(b) prohibits overcharges of settlement service charges. *See Cohen*, 498 F.3d at 114; *Kruse*, 383 F.3d at 57; *Sosa*, 348 F.3d at 983; *see also*, *e.g.*, *Martinez*, 598 F.3d at 553-54 (collecting cases). There is no reason for the Court to grant certiorari to address a perceived lack of clarity on deference principles when there is no agency interpretation that applies to Petitioners' claims.

There is nothing in HUD Statement of Policy 2001-1 indicating that loan discount fees should be construed as "real estate settlement service" charges; indeed, the policy statement does not even attempt to define settlement service charges. Thus, alleged

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[69] Petitioners' brief at p.29.

"deference" to HUD Statement of Policy 2001-1 has no relevance here, where Section (8)(b) reaches only settlement service charges.

Further, there is no lack of clarity concerning the *methodology* for considering whether HUD's interpretation of Section 8(b) warrants deference and there is no actual split in authority in the application of that methodology. Circuit courts "agree on the mode of analysis" to apply this Court's deference principles.[70] To the extent that there is variance in the application of that mode of analysis to HUD Statement of Policy 2001-1, that variance is based on *dicta* and on the different types of charges considered and the specific provision(s) of Section 8 involved in a particular case.

Circuit courts that have deferred to HUD Statement of Policy 2001-1 have done so only after perceiving an ambiguity in Section 8. Most of these decisions involve the application of Sections 8(a) or 8(c) to the payment of a particular type of payment that is the central subject of the policy statement, "yield spread premiums." *See Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1259, 1261 (11th Cir. 2002); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1005-06 (9th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961-62 (8th Cir. 2002). Notably, several circuit courts that have deferred to HUD

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[70] Lisa Shultz Brennan, *How Mead Has Muddled Judicial Review of Agency Actions*, 58 Vand. L. Rev. 1443, 1461 (October 2005).

Statement of Policy 2001-1 with respect to Section 8(a)'s application to yield spread premiums have refused to defer to the same statement in cases involving Section 8(b). *See Friedman*, 520 F.3d at 1298 (distinguishing *Heimmermann*); *Haug*, 317 F.3d at 839 (distinguishing *Glover*). Only after finding an ambiguity have circuit courts deferred to a specific part of HUD Statement of Policy 2001-1 based on principles espoused in this Court's jurisprudence as to when informal agency policy statements should be given deference.

Some circuits have found Section 8(b) ambiguous with respect to very specific categories of charges, like markups, and only then proceeded to determine that HUD Statement of Policy 2001-1 was entitled to deference. *Kruse*, 383 F.3d at 57-58; *cf. also Santiago*, 417 F.3d at 389 n.4 (finding that Section 8(b) unambiguously permitted a cause of action for markups but also noting that deference to HUD Statement of Policy 2001-1 would be appropriate). These cases, however, considered HUD's commentary on markups, but that question is not involved in this case. Assuming *arguendo* that the loan discount fees are settlement service charges and disregarding the unrefuted, competent summary judgment evidence that those fees were earned, this case involves an overcharge, which all circuits agree does not violate Section 8(b). *See, e.g., Martinez,* 598 F.3d at 553-54.

The Second Circuit is the only circuit court that has held that Section 8(b) is ambiguous regarding "unearned, undivided fees" (when a service provider

charges and retains an entire fee for which no service is rendered) and afforded deference to HUD Statement of Policy 2001-1 with respect to that type of fee. *Cohen*, 498 F.3d at 113, 124-25. The loan discount fees at issue here, however, were earned, were not settlement service charges, and were not unearned, undivided fees. While the Fifth Circuit undertook an analysis of Section 8(b) as applied to unearned, undivided fees, that analysis was unnecessary.

Because the fees here were earned and were not settlement service charges, any purported conflict regarding the level of deference that should be afforded to HUD Statement of Policy 2001-1 as applied to *unearned*, undivided fees under Section 8(b) is not yet mature and does not warrant this Court's attention.

In short, this case, which involves a unique and particular type of fee, is not the appropriate vehicle to develop this Court's guidance regarding the level of deference to be afforded to agency rules in general or to HUD Statement of Policy 2001-1.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

The Fifth Circuit recognized that it was "enter[ing] the interpretive fray," Pet. App. 7a, over whether "REPSA § 8(b) requires two culpable parties, a giver and a receiver of the unlawful fee," *id.* 6a. The court acknowledged that three circuits have held that it does not. *Id.* 6a. However, the Fifth Circuit adopted instead the view of three other circuits that "RESPA is an anti-kickback statute," *id.* 10a, and, accordingly, prohibits lenders from charging unearned fees only if they split the fee with a third party, *id.* 7a-8a.

Quicken does not contest either the existence of this circuit conflict or its importance. Nor could it. The circuit split has been widely recognized by courts and commentators alike.[1] And the applicability of Section 8(b) to various settlement charges is a recurring question under a statute that governs millions of mortgage closings every year.[2] Nor does Quicken deny that the continued existence of such dramatically different interpretations of the same statute is untenable, requiring this Court's

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[1] *See* Pet. 18 n.11 (collecting cases); John R. Chiles & Zachary D. Miller, *The Long Arm of RESPA: Judicial Expansion of Section 8(b) in 2009*, 64 CONSUMER FIN. L.Q. REP. 22, 34 (2010) ("Of course, hanging over the head of any RESPA observer is the possibility of a United States Supreme Court decision settling the current circuit split."); Jonathan P. Solomon, *Resolving RESPA's § 8(b) Circuit Split*, 73 U. CHI. L. REV. 1487 (2006).

[2] Indeed, petitioners' research has identified more than thirty federal decisions in Section 8(b) cases since this petition was filed in February.

intervention to restore a uniform meaning to a statute Congress specifically enacted to create a single standard throughout the nation. Pet. 17-18.

Instead, Quicken insists that the Court should deny certiorari because the question upon which the courts are divided arose in this case with respect to an unearned, undivided fee, while other courts have typically confronted markups. BIO 15. But beyond simply pointing out this factual difference, Quicken makes no effort to explain why it matters. The circuits themselves have seen no relevant distinction between these slightly different forms of unearned charges.

Quicken's only other grounds for opposing certiorari are its insistence that it could have prevailed below on alternative grounds that neither court addressed, BIO 19-21, and that the decision below is correct, *id.* 22-28. Neither assertion is a reason to deny certiorari, and both are meritless in any event.

I. The Circuits Are Divided Four To Three Over Whether RESPA Section 8(b) Prohibits Only Kickbacks, Or Instead Reaches All Unearned Fees.

Quicken does not seriously dispute that circuits broadly disagree whether RESPA prohibits only kickbacks or instead also prohibits a defendant from charging and retaining for itself an unearned fee. The court of appeals in this case itself explained that the "Fourth, Seventh, and Eighth Circuits have each held that RESPA § 8 is exclusively an anti-kickback provision" while the "Second, Third, and Eleventh Circuits have rejected the two-party requirement . . . ." Pet. App. 6a. Quicken nonetheless

argues that "the 'four to three' circuit split cited by Petitioners is not a basis for granting review in this case," because some of the cases in the split involved "markups" and others involved "unearned, undivided" fees. BIO 15. But that distinction made no difference to any of the courts in the split. And the fact that the question presented by the petition controls the disposition of claims regarding a variety of different fees, arising in a range of different contexts, is a reason to grant review, not to deny it.

1. In resolving the lawfulness of markups, the Fourth, Seventh, and Eighth Circuits have adopted a rule that applies equally to unearned, undivided fees. For example, the Eighth Circuit has held that markups are not actionable under RESPA unless divided with a third party because it has construed Section 8(b) to be "an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute," *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003), not because of anything particular to markups. *See also Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002) ("[S]ection 8(b) is an anti-kickback provision."); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 264 (4th Cir. 2002) ("We agree with the Seventh Circuit that § 8(b) is a prohibition on kickbacks . . . .").

Because that rationale applies equally to the kind of unearned, undivided fee imposed in this case, the Fifth Circuit rightly observed that "[p]resumably, the three circuits that require two culpable actors would not find undivided, unearned charges actionable" either. Pet. App. 6a-7a. In fact, district courts in the Fourth and Seventh Circuits have relied

on their circuit's markup precedent to reject challenges to unearned, undivided fees. *See Haehl v. Wash. Mut. Bank, F.A.*, 277 F. Supp. 2d 933, 937 (S.D. Ind. 2003); *Stith v. Thorne*, 488 F. Supp. 2d 534, 557 (E.D. Va. 2007).

At the same time, three other circuits have applied RESPA to markups because they reject the assertion that the statute unambiguously applies only to kickbacks. *See Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 388-89 (3d Cir. 2005); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58 (2d Cir. 2004); *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Again, nothing about those courts' reasoning rests on anything special about markups that distinguishes them from other unearned fees. Quicken has not suggested that any of these courts would reverse course and suddenly conclude that RESPA is only an anti-kickback statute as applied to unearned, undivided fees. And, in fact, when confronted with that question, the Second Circuit has rejected the fee-splitting requirement in both contexts. *See Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007) (unearned, undivided "post-closing fee"); *Kruse*, 383 F.3d at 58 (markup).

The fact that courts have treated markup decisions as relevant authority in cases involving undivided, unearned fees confirms the irrelevance of the distinction upon which Quicken relies. In this case, for example, the Fifth Circuit relied on markup decisions from the Fourth and Seventh Circuits to decide whether Quicken's unearned, undivided fee was subject to Section 8(b). *See* Pet. App. 7a-8a. Moreover, it rejected petitioners' reliance on the

Third Circuit's markup decision in *Santiago*, not because it arose in a distinguishable context, but rather because the court disagreed with *Santiago* on the merits. *Id.* 14a. *See also Cohen*, 498 F.3d at 119-20 (Second Circuit undivided, unearned fee case considering, as relevant authority, markup cases on both sides of the circuit conflict).

None of this is at all surprising. Quicken never even attempts to explain why RESPA would apply differently to markups and unearned, undivided fees. Both are "charge[s] made or received for the rendering of a real estate settlement service" for services that are not "actually performed." 12 U.S.C. § 2607(b). The only difference is that the unearned markup is tacked on to some other fee being passed on to the consumer, whereas an unearned, undivided fee is billed as its own line item. But nothing in the text of RESPA turns on that distinction. The only reason for arguing that either is exempt from RESPA is the claim that Section 8(b) is an anti-kickback statute that requires fee splitting. And on that question, the circuits are indisputably divided.[3]

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[3] As the petition explained, this case also implicates a long-standing division in the circuits regarding the application of this Court's *Chevron* jurisprudence to less formal agency interpretations. Pet. 29-32. Quicken argues that there is "no lack of clarity concerning the *methodology* for considering whether HUD's interpretation of Section 8(b) warrants deference . . . ." BIO 30 (emphasis in original). But numerous courts and commentators, as well as Justice Scalia, have recognized that the opposite is true. *See* Pet. 29-31. Contrary to Quicken's assertion, BIO 30-31, this disparity does not arise from the fact that different courts have examined different aspects of HUD's Policy Statement addressing different portions

2. Quicken cannot, and does not, suggest that the courts of appeals will reconcile their construction of RESPA absent this Court's intervention. As the petition demonstrated, the circuits are not drifting towards a consensus but instead are simply picking sides in a well-ventilated disagreement about the best reading of the statute. Pet. 18-19. Further percolation would serve no purpose.

II. This Case Is An Appropriate Vehicle For Resolving The Circuit Conflict.

Quicken next argues that this case presents a poor vehicle for resolving any circuit conflict because even if the Court reverses the Fifth Circuit's construction of RESPA, Quicken could ultimately prevail in this case on other grounds. In particular, Quicken contends that the loan discount fees it charged petitioners were not unearned as a factual matter, BIO 10, 19-20, and insists that loan discount fees are not covered by RESPA in the first place. BIO 10, 17-19.

The courts below did not address these arguments, and neither provides a reason to deny the petition. That a respondent may have other defenses

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of RESPA. Instead, courts have disagreed over the more basic question of the *Chevron* consequences of HUD's decision to forgo notice-and-comment rulemaking or a similarly formal process for issuing its interpretation. *Compare Krzalic*, 314 F.3d at 881, *and* Pet. App. 13a, *with Kruse*, 383 F.3d at 60-61, *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1012-14 (9th Cir. 2002), *and Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261-62 (11th Cir. 2002).

to raise on remand is no reason to deny review of the ground upon which the case was actually decided. *See, e.g., Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (deciding question presented and remanding for adjudication of alternative defenses); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1610 n.3 (2010) (same). And in any event, both alternative defenses are meritless.

1. Quicken claims to have established at summary judgment that that the loan discount fees it charged petitioners "were earned in exchange for the loans Petitioners received." BIO 20. That is simply untrue.

In response to Quicken's Statement of Uncontested Material Facts, petitioners expressly asserted that "loan discount fees were paid to lower their interest rates, but such service was not provided."[4] They further presented detailed summary judgment evidence contradicting Quicken's assertion that the discount fees were earned. For example, the Freemans submitted Quicken's underwriting analysis report finding that they qualified for a rate of 6.375% with no points.[5] The Freemans then paid a loan discount fee to lower the interest rate,[6] but the final rate was still 6.375%.[7]

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[4] Freeman and Bennett Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts ¶¶ 3, 11.

[5] Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment, Ex. 30.

[6] *Id.* Ex. 7.

[7] *Id.* Ex. 1.

Quicken presented no evidence to explain why the Freemans would be required to pay a loan discount fee to receive the rate for which they initially qualified without one.[8]

Quicken nonetheless insists that because petitioners "admitted that the loan discount fees were a component of the pricing of each loan," they thereby conceded that "the loan discount fees were *earned*." BIO 20 (emphasis in original). Not so. Obviously, the loan discount fee, like the loan origination fee and other closing charges, was a component of the price Quicken charged petitioners in exchange for obtaining their loans. But that hardly makes the fee earned. If it did, any fee (for example, a courier fee) would be considered earned so long as it was demanded as a condition of closing the loan, even if the service was never actually provided.

2. Alternatively, Quicken argues that "the loan discount fees paid by Petitioners are not settlement service charges subject to Section 8(b)." BIO 17. Section 8(b), Quicken notes, regulates only "charge[s] . . . *for the rendering of a real estate settlement service*." BIO 17 (citing 12 U.S.C. § 2607(b)) (emphasis in original). And, it argues, a loan discount fee is not a charge for a "real estate settlement service" because "it is part of the pricing of a loan, is related to the interest rate, and is not charged for a 'service' provided in connection with the execution of a mortgage." BIO 18-19.

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[8] The Bennetts provided comparable evidence with respect to their loans, *id.* at Exs. 3, 8, 21, as did the Smiths, *id.* at Exs. 5, 9, 31.

As an initial matter, Quicken waived this argument by failing to raise it until its reply brief at summary judgment. *See* Pet. App. 33a, 35a-36a; *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) ("Arguments raised for the first time in a reply brief . . . are waived.").[9]

But even if the argument had been preserved, it is unavailing. "Settlement services" is a defined statutory term, including not only "administrative services," BIO 18, but also financial services, including "title insurance" and the "funding of loans." 12 U.S.C. § 2602(3).[10] Loan discount fees fall squarely within this definition because they constitute part of the fee paid for the financial service of funding the loan.

Contrary to Quicken's suggestion, loan discount fees are not "*terms* of a loan." BIO 18 (emphasis in original). The mortgage note, which contains the terms of the loan, makes no mention of points or loan discount fees; it simply reflects the final interest rate.[11] A loan discount fee, instead, is a one-time charge paid at settlement to secure a loan with particular terms, including a specific interest rate. It

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[9] The Fifth Circuit also noted that Quicken argued the point only "cursorily" on appeal. Pet. App. 4a n.1.

[10] "Settlement services" is defined to include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans." 12 U.S.C. § 2602(3).

[11] *See, e.g.*, Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment, Ex. 1 (Freemans' mortgage note).

is no more a term of the loan than is a loan origination fee, which is also required in order to obtain the loan the lender has offered.

This understanding of the statutory language is confirmed by the administrative regulations, *see* Pet. 20 n.12,[12] and the history of the statute. Congress added "funding of loans" to the definition of "settlement services" in 1992 to overturn the result in *United States v. Graham Mortg. Corp.*, 740 F.2d 414 (6th Cir. 1984). *See Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1194 (11th Cir. 2010) (noting that the 1992 RESPA amendments were "enacted specifically in response to *Graham*"). In *Graham*, a mortgage lender charged a home builder "fewer points than it charged to other[s]," in exchange for referring its homebuyers to the bank for mortgages. 740 F.2d at 416. The buyers, then, were charged increased points to make up for the discount given to the builder. *Id.* Relying on the rule of lenity, the Sixth Circuit reversed the lender's conviction because RESPA's definition of "settlement services" did not unambiguously encompass the loan discount fee before it. *Id.* at 423. Congress amended the statute to remove that ambiguity, believing that "mortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute." H.R. Rep. 102-760, 58 (1992).

---

[12] In implementing RESPA's requirement that lenders provide "a good faith estimate" for "specific settlement services the borrower is likely to incur in connection with the settlement," 12 U.S.C. § 2604(c), HUD requires loan discount fees to be disclosed on a good faith estimate form, 24 C.F.R. Pt. 3500 App. C.

Quicken cannot plausibly contend that the amendment designed to overrule *Graham* does not extend RESPA to cover the very loan discount fees at issue in that case and this one.[13]

III. The Decision Below Is Incorrect.

Nothing about Quicken's defense of the Fifth Circuit's construction of RESPA justifies allowing the circuit conflict to persist, and it is unconvincing in any event.

Quicken largely repeats without further elaboration the Fifth Circuit's textual analysis, BIO 22-25, which petitioners have already addressed, Pet. 19-23.

Apart from the text, Quicken claims that the "interpretation suggested by Petitioners . . . would make Section 8(b) a price-control mechanism." BIO 25. But prohibiting providers from charging fees for services never rendered is no more a form of "price control" than are statutes prohibiting fraud. Nor does enforcing that prohibition embroil courts in difficult economic determinations – the only reasonable price for a service not provided is zero. Moreover, even under Quicken's interpretation of the statute, a fee split with a third party is unlawful only if it is unearned. *See* BIO 13. Thus, to the extent Quicken objects to courts deciding whether a particular fee was earned or not, that is an objection to the statute, not to petitioners' interpretation of it.

---

[13] The Eleventh Circuit's contrary decision in *Wooten* is based in part on its misreading of *Graham* as not involving loan discount fees. *See* 626 F.3d at 1194; *cf.* BIO 19.

At the same time, Quicken offers no explanation why Congress would have intended to prohibit even small unearned fees when they are split, but turn a blind eye when providers falsely charge exorbitant fees for services they never provided, so long as they retain the entirety of the ill-gotten gains for themselves. Whether the fee is split or not has no impact on the consumer; in either event, the fee contributes to the "unnecessarily high settlement charges" the statute was meant to redress. 12 U.S.C. § 2601(a). Moreover, Quicken cannot explain why Congress would bother requiring providers to "clearly itemize all charges imposed upon the borrower," *id.* § 2603, if they could comply with this requirement by simply making up line items for services never provided and keeping the unearned charges.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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April 26, 2011

AMICUS CURIAE BRIEF

No. 10-1042

In the Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Real Estate Settlement Procedures Act of 1974 provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. 2607(b). The question presented is as follows:

Whether, to establish a violation of Section 2607(b), a plaintiff must demonstrate that an unearned fee for a real estate settlement service was divided between two or more persons.

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In the Supreme Court of the United States

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TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, to ensure that "consumers * * * are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). To that end, RESPA includes a "[p]rohibition against kickbacks and unearned fees." 12 U.S.C. 2607. Subsections (a) and (b)

of Section 2607 establish distinct prohibitions on abusive conduct related to the provision of real estate settlement services.

Section 2607(a) of Title 12 addresses kickbacks and provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. 2607(a). Section 2607(b) addresses unearned fees and provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. 2607(b).[1]

Congress authorized the Department of Housing and Urban Development (HUD) to administer RESPA. Section 2617(a) authorized HUD to "prescribe such rules and regulations" and "make such interpretations" as are "necessary to achieve the purposes of [RESPA]."[2]

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[1] The criteria for identifying "federally related" mortgage loans are set forth in 12 U.S.C. 2602(1).

[2] Congress authorized enforcement of Section 2607 through, *inter alia*, criminal prosecutions and HUD actions for injunctive relief. 12 U.S.C. 2607(d)(1) and (4). Private parties may also bring actions for damages to remedy kickback and unearned-fee violations. 12 U.S.C. 2607(d)(2). The Court has granted certiorari on the question whether a private Section 2607(d) plaintiff has standing to sue under Article III

HUD's regulations promulgated under that authority are codified at 24 C.F.R. Pt. 3500. Under 24 C.F.R. 3500.4(a)(1)(ii), policy statements published by HUD in the *Federal Register* are also "official interpretations" of RESPA "upon which the public may rely." 57 Fed. Reg. 49,604 (1992).

On July 21, 2011, HUD's consumer protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (the Bureau). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. On the same date, the Bureau issued a notice stating that it would enforce HUD's RESPA regulations, 24 C.F.R. Pt. 3500, and that, pending further Bureau action, it would also apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

b. HUD consistently interpreted Section 2607(b) to prohibit all unearned fees, regardless of whether those fees are divided between two or more people. For example, HUD's 1976 consumer information booklet explained that, in addition to RESPA's prohibition of kickbacks, "[i]t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 Fed. Reg. 20,289 (1976). In 1992, after notice-and-comment rulemaking, HUD adopted a regulation stating that "[a] charge by a person for which no or nominal services are performed or for which duplica-

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in the absence of a claim that the alleged RESPA violation affected the price, quality, or other characteristics of the settlement services provided. See *First Am. Fin. Corp.* v. *Edwards*, No. 10-708, cert. granted, No. 10-708 (June 20, 2011). That standing question is not implicated in this case.

tive fees are charged is an unearned fee and violates [Section 2607]." 24 C.F.R. 3500.14(c). HUD reiterated that interpretation in other rulemakings. See, *e.g.*, 61 Fed. Reg. 29,249 (1996) ("[N]o person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. * * * [T]wo persons are not required for [Section 2607(b)] to be violated.").

In 2001, in response to the Seventh Circuit's decision in *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623 (2001), HUD issued a policy statement indicating that HUD "specifically interprets [Section 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." 66 Fed. Reg. 53,057.[3] The policy statement gave four non-exclusive examples of unearned fees:

> (1) [t]wo or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or [(4)] the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

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[3] In *Echevarria*, the Seventh Circuit held that Section 2607(b) is violated only when two or more parties split an unearned fee. 256 F.3d at 626-627. The court suggested, however, that it might reconsider its holding in a future case if HUD were to make "a formal commitment * * * to an opposing position." *Id.* at 630.

Ibid. The policy statement explained that, because the "proscription [in Section 2607(b)] against 'any portion, split, or percentage' of an unearned charge for settlement services is written in the disjunctive, the prohibition is not limited to a split." *Id.* at 53,058. Thus, Section 2607(b) "forbids the paying or accepting of any portion or percentage of a settlement service [charge]—including up to 100%—that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person." *Ibid.*

RESPA also required HUD, in consultation with certain other federal officials, to "develop and prescribe a standard form for the statement of settlement costs," which "shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement." 12 U.S.C. 2603(a). To carry out that statutory mandate, HUD developed a "[u]niform settlement statement" known as the "HUD-1" form. That form requires disclosure, "[f]or each separately identified settlement service in connection with the transaction," of "the name of the person ultimately receiving the payment" and "the total amount paid to such person." 24 C.F.R. Pt. 3500, App. A; see 24 C.F.R. 3500.8.

2. Petitioners obtained mortgage loans from respondent Quicken Loans, Inc. Petitioners contend that respondent charged them fees for which no services were provided, in violation of Section 2607(b). Specifically, the Freemans and the Bennetts allege that they were charged loan discount fees of $980 and $1100, respectively, but that respondent did not give them lower interest rates in return. Pet. App. 20a-21a & n.2, 22a & n.6. The Smiths allege that they were charged a loan origination fee of more than $5100 that was duplicative

of the loan processing fee that they were also charged; or, alternatively, that the $5100 charge was a loan discount fee for which they did not receive a lower interest rate. *Id.* at 21a-22a & n.4.

Petitioners filed separate actions in state court. Respondent removed the suits to federal court, where the cases were consolidated. Pet. App. 3a. Respondent moved for summary judgment on the ground that petitioners' claims are not cognizable under Section 2607(b) because the allegedly unearned fees were not split with another party. *Id.* at 23a-24a.

3. The district court granted summary judgment for respondent. Pet. App. 19a-70a. The court noted that "several circuit courts have split on the issue of whether Section [2607(b)] provides a claim in a situation where a *single* settlement services provider retains unearned fees." *Id.* at 43a. After reviewing those decisions, the court concluded that "the plain language of Section [2607(b)] requires an allegation that the challenged fees have been split in some fashion." *Id.* at 66a (emphasis omitted). Because petitioners did not contend that respondent had split the allegedly unearned loan discount fees with another party, *id.* at 66a, 69a, the court concluded that no violation of Section 2607(b) had occurred, *id.* at 67a, 69a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

a. The court of appeals explained that the circuits are in conflict on the question whether Section 2607(b) prohibits a settlement service provider from marking up the charge for a settlement service provided by a third party, furnishing no additional service, and retaining the entire amount of the mark-up. Pet. App. 6a. The Fourth, Seventh, and Eighth Circuits have held that Section 2607(b) "requires two culpable parties, a giver

and a receiver of the unlawful fee, rendering mark-ups by a sole services provider not actionable." *Ibid.* (citing *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003)). In contrast, "[t]he Second, Third, and Eleventh Circuits have rejected the two-party requirement and held that RESPA [Section 2607(b)] prohibits mark-ups." *Ibid.* (citing *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004); *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384 (3d Cir. 2005), *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003)).

The court of appeals further explained that the Second Circuit has specifically addressed the question whether Section 2607(b) prohibits a settlement service provider from simply charging and collecting an unearned fee (rather than marking up a fee that was actually earned by someone else). Pet. App. 6a (citing *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007)). The court noted that the Second Circuit in *Cohen* had held such conduct to be covered. See *ibid.* The court assumed that the Fourth, Seventh, and Eighth Circuits, which require two culpable actors even in the context of a mark-up, "would not find undivided unearned charges actionable." *Id.* at 6a-7a.

The court of appeals concluded that Section 2607(b) does not cover undivided, unearned fees. Pet. App. 7a. First, the court stated that the language of Section 2607(b)—"[n]o person shall give and no person shall accept"—indicates that Congress was "aiming at an exchange or transaction, not a unilateral act." *Ibid.* (quoting *Boulware*, 291 F.3d at 266). Second, the court ex-

plained that the anti-kickback provision of RESPA, which provides that "[n]o person shall give and no person shall accept" a kickback, see 12 U.S.C. 2607(a), "clearly requires two culpable actors." Pet. App. 8a. The court inferred that, to be consistent with that provision, Section 2607(b) "should require two culpable actors as well." *Ibid.* Third, the court determined that the language "any portion, split, or percentage" in Section 2607(b) "requires that two parties share something," because "[t]he definitions of all three words require less than 100% or the whole of something." *Id.* at 8a-9a. Finally, the court explained that, "when read in its entirety, RESPA is an anti-kickback statute." *Id.* at 10a. The court noted that the statute's "purpose" section "explicitly and exclusively prohibits kickbacks and referral fees," but does not mention "a general prohibition on * * * unearned fees or other forms of price abuse." *Ibid.* (emphasis omitted).

The court of appeals concluded that because Section 2607(b) is "clear on its face," it had "no need to look to any regulatory interpretation, such as the HUD 2001 [policy] statement." Pet. App. 12a. The court also stated that the HUD policy statement did not have the "force of law" because it was not adopted through notice-and-comment rulemaking, and that the court found the policy statement "unpersuasive" in any event. *Id.* at 13a.

b. Judge Higginbotham dissented. Pet. App. 15a-18a. He concluded that the phrase "any portion, split, or percentage of any charge . . . other than for services actually performed" is ambiguous with respect to Congress's intent to prohibit unearned, undivided fees. *Id.* at 17a. In his view, "[p]rohibiting such fees strikes at a core objective of RESPA: promoting transparency of

costs associated with settlement" and "reducing abuses by those in the mortgage industry through charging borrowers fees for work not actually performed." *Ibid.* Judge Higginbotham further explained that adopting this interpretation "would not lead * * * to a rate-setting regime" because "the reasonable fee for nothing is nothing," and thus "[w]hen the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee." *Id.* at 17a-18a.

DISCUSSION

The court of appeals' decision is inconsistent with RESPA and with HUD's longstanding regulations and policy statement interpreting Section 2607(b), which the Bureau has adopted. The decision also implicates and deepens an entrenched conflict among the courts of appeals. The Court should grant the petition for a writ of certiorari and resolve this important issue so that RESPA will be enforced uniformly nationwide.

A. The Court Of Appeals Erred In Holding That 12 U.S.C. 2607(b) Prohibits Only Unearned Fees That Are Shared By Two Or More Parties

1. The court of appeals erred in concluding that a violation of Section 2607(b) requires "two parties each committing [a prohibited] act." Pet. App. 7a. The statutory text, which provides that "[n]o person shall give and no person shall accept" any unearned settlement charges, 12 U.S.C. 2607(b), prohibits two separate actions: giving an unearned fee, and accepting an unearned fee. As the Eleventh Circuit explained in *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (2003), "[g]iving a portion of a charge is prohibited regardless of whether there is a culpable acceptor, and accepting a

portion of a charge is prohibited regardless of whether there is a culpable giver." *Id.* at 982.

In construing Section 2607(b), the court of appeals relied in part on RESPA's anti-kickback provision (12 U.S.C. 2607(a)), which contains the same "[n]o person shall give and no person shall accept" language, and which "clearly requires two culpable actors." Pet. App. 8a. The court's reliance on Section 2607(a) was misconceived. Section 2607(a) prohibits the payment and acceptance of "any fee, kickback, or thing of value *pursuant to any agreement or understanding* * * * that business * * * shall be referred to any person." 12 U.S.C. 2607(a) (emphasis added). It is the language italicized above, rather than Section 2607(a)'s "[n]o person shall give and no person shall accept" language, that specifically requires two culpable parties. Section 2607(b), by contrast, simply prohibits giving or accepting "any charge * * * for the rendering of a real estate settlement service * * * other than for services actually performed," without reference to any "agreement or understanding." Such conduct does not necessarily require two or more participants. See *Sosa*, 348 F.3d at 981-982 (explaining that Section 2607(b) is intended "to close any loopholes," and that, "[r]ead together, [Sections 2607(a) and 2607(b)] create a broad prohibition against fees that serve solely to increase the cost of settlements to consumers.").

2. The court of appeals was also wrong in reading Section 2607(b)'s reference to "any portion, split, or percentage of any charge," 12 U.S.C. 2607(b), to "require[] that two parties share something." Pet. App. 8a. Although common usage suggests that a "split" of a charge is a fee shared by two or more persons, the terms "portion" and "percentage" do not necessarily have the same

connotation. As HUD explained in its policy statement, RESPA's reference to any "portion" or "percentage" of an unearned settlement service charge "includ[es] up to 100% * * * whether the entire charge is divided or split among more than one person or entity or is retained by a single person." 66 Fed. Reg. at 53,058. Congress's use of the broad term "any" portion, split, or percentage supports this interpretation. Thus, under HUD's longstanding RESPA regulations, "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [Section 2607(b)]." 24 C.F.R. 3500.14(c).

The court of appeals' interpretation would lead to absurd results. See *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011) (courts should avoid absurd results when interpreting statutes). Under that approach, for example, Section 2607(b) would be violated when a lender charges a borrower $250 for a title search provided by a third party for $200, and the lender and third party split the $50 unearned fee. However, if the lender keeps the entire $50 unearned fee, the court of appeals would find no violation. And if the lender collects $250 from the borrower for a title search and no title search is performed at all, the court of appeals would likewise conclude that no violation had occurred. Given the statute's prohibition of accepting "any portion, split, or percentage of any charge * * * other than for services actually performed," 12 U.S.C. 2607(b), Congress could not have intended such disparate outcomes.

3. Contrary to the court of appeals' suggestion (Pet. App. 10a), RESPA is not exclusively an anti-kickback statute. Although Congress identified "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services" as one

of RESPA's purposes, 12 U.S.C. 2601(b)(2), Section 2607(a)'s ban on kickbacks is only one of the prohibitions the statute imposes. If Congress's statement of purposes were treated as exhaustive, other substantive provisions of RESPA—such as the prohibition of fees for preparing truth-in-lending statements, 12 U.S.C. 2610—would be unenforceable because they are not specifically listed among the statute's purposes in Section 2601(b). Congress's own characterization of Section 2607 in its title, "Prohibition against kickbacks and unearned fees," Real Estate Settlement Procedures Act of 1974 (RESPA), Pub. L. No. 93-533, § 8, 88 Stat. 1727, reinforces the conclusion that RESPA is not exclusively "an anti-kickback statute," Pet. App. 10a.[4]

This Court has repeatedly explained that the omission of particular conduct from a statute's "purpose" section is "irrelevant" when the statute's operative provisions unambiguously address such conduct. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Section 2607(b) unambiguously addresses conduct broader than "kickbacks" and

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[4] The title of Section 2607(b), "Splitting charges," does not appear in the Statutes at Large. See RESPA, § 8(b), 88 Stat. 1727. Because Title 12 of the United States Code has not yet been "enacted into positive law," 1 U.S.C. 204(a), the Statutes at Large provide the "legal evidence of laws," 1 U.S.C. 112. Thus, contrary to respondent's suggestion (Br. in Opp. 5-6), the title of Section 2607(b) in the United States Code is due no weight. See *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

"referral fees": it prohibits charges "other than for services actually performed." 12 U.S.C. 2607(b); see *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005) (Section 2607(a) applies to kickbacks, whereas Section 2607(b) applies to "a situation other than kickbacks").[5]

The court of appeals was also wrong in stating that RESPA's legislative history cannot "be fairly read to cover undivided [unearned] fees." Pet. App. 11a n.9. The court below relied on the Senate Report's statement that Section 2607 "is intended to prohibit all kickbacks or referral fee arrangements." *Ibid.* (emphasis omitted) (quoting S. Rep. No. 866, 93d Cong., 2d Sess. 1 (1974) (Senate Report)). The Senate Report states that one of the purposes of the bill subsequently enacted as RESPA was the elimination of "kickbacks and unearned fees," Senate Report 1, and the same report also identifies, as one of the "problem areas" that RESPA was intended to address, "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers *without providing any real benefits to them*." *Id.* at 2 (emphasis added). The report further states that, "[b]y dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account requirements, the Committee believes that [RESPA] will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." *Id.* at 3 (emphasis

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[5] Section 2607(c) further supports that reading of the statute by providing a safe harbor for specified fees and "bona fide" compensation paid for goods or services "actually rendered," "actually performed," or "actually furnished." 12 U.S.C. 2607(c)(1) and (2). If unearned fees were beyond RESPA's reach, as the court of appeals concluded, that safe harbor would be unnecessary.

added). The House Report reiterates those views. H.R. Rep. No. 1177, 93d Cong., 2d Sess. 3, 4 (1974).

4. To the extent that the text of Section 2607(b) is unclear, HUD's longstanding interpretation is entitled to deference. When a statute is ambiguous, a court must determine if the agency's interpretation is based on "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). If Congress has expressly delegated authority to the agency "to elucidate a specific provision of the statute by regulation," those regulations are to be given "controlling weight" unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 844.

Pursuant to its statutory authority, 12 U.S.C. 2617(a), HUD determined through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed * * * is an unearned fee and violates [Section 2607(b)]." 24 C.F.R. 3500.14(c). In stating that it would not defer to HUD's policy statement because it was not adopted through notice-and-comment rulemaking (Pet. App. 13a), the court of appeals overlooked that regulation. *Chevron* deference may be appropriate, moreover, even when agency interpretations are reached "through means less formal than 'notice and comment' rulemaking." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). HUD's policy statement specifically addressing the question of undivided, unearned fees, 66 Fed. Reg. at 53,058, is an official agency interpretation warranting *Chevron* deference. See 24 C.F.R. 3500.4(a)(1)(ii) (policy statements published in the *Federal Register* are interpretations for purposes of Section 2617(a)); 57 Fed. Reg. at 49,604 (Section 2617(a) gave HUD authority to render "official interpretations" by means other than regulations); see also *Kruse* v.

Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 58-61 (2d Cir. 2004) (deferring to HUD's policy statement).

B. The Circuits Are Squarely In Conflict Regarding The Interpretation Of 12 U.S.C. 2607(b), And This Case Is A Suitable Vehicle For Resolving The Conflict

1. As the court of appeals observed (Pet. App. 6a), the Fourth, Seventh, and Eighth Circuits have held that Section 2607(b) is violated only when two culpable parties share an unearned fee. See *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003)). In contrast, the Second, Third, and Eleventh Circuits have held that Section 2607(b) is violated when a party marks up the fee for a settlement service provided by a third party and retains the entire unearned portion of the fee. See *Kruse*, 383 F.3d at 62; *Santiago*, 417 F.3d at 389; *Sosa*, 348 F.3d at 982-983. The Second Circuit also has held that Section 2607(b) prohibits undivided, unearned fees charged by a settlement service provider. *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111, 113, 124-125 (2007).

All of those cases except for *Cohen* involved situations in which the settlement-service provider marked up the cost of a service actually provided by a third party, thereby obtaining a fee for which it performed no service. The question in those cases was whether the settlement-service provider could be held liable under Section 2607(b) if it retained the entire unearned fee for itself rather than sharing it with the third party. Here and in *Cohen*, by contrast, no third party was involved in the allegedly unlawful conduct, and the question is

whether an undivided, unearned fee violates Section 2607(b). Respondent contends (Br. in Opp. 4) that, because of that factual difference, there is no "entrenched" conflict among the circuits.

Respondent's argument is incorrect, because the reasoning of the courts of appeals that have held mark-ups to be covered applies *a fortiori* to the situation presented here. The rationale for treating a mark-up as a fee "other than for services actually performed," 12 U.S.C. 2607(b), is that the settlement-service provider itself performs no services in return for the money it receives, even though the mark-up nominally corresponds to services performed by a third party. *Santiago*, 417 F.3d at 389; *Kruse*, 383 F.3d at 62; *Sosa*, 348 F.3d at 982-983. If, as the Second, Third, and Eleventh Circuits have held (and as HUD consistently concluded), charges of that character are fees "other than for services actually performed," Section 2607(b) applies even more clearly to fees for purported services that are not performed at all. The court of appeals' decision in this case therefore directly implicates the entrenched circuit split concerning the application of Section 2607(b) to mark-ups by settlement service providers. The conflicting decisions of seven courts of appeals demonstrate that the question presented has been thoroughly ventilated and warrants the Court's review.[6]

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[6] Moreover, even if it were logically possible to separate the six circuit holdings in the mark-up cases from the undivided, unearned fee scenario here, the court of appeals' ruling directly conflicts with the Second Circuit's decision in *Cohen*. See 498 F.3d at 126 ("HUD reasonably construes [Section 2607(b)] to prohibit 'one service provider' from charging the consumer a fee for which 'no . . . work is done,'" and plaintiff "adequately states a claim * * * by alleging that [defendant] collected an undivided unearned fee.").

2. Respondent contends (Br. in Opp. 17-21) that the Court should not review the decision below because the court of appeals could have granted summary judgment to respondent on other grounds. Specifically, respondent contends that loan discount fees fall outside Section 2607(b) because they are not fees for "settlement services," and that the fees in this case were earned. Neither of those alternative arguments would prevent the Court from reaching the question presented in this case.

a. Respondent contends (Br. in Opp. 17-19) that the loan discount fees in this case are not covered by Section 2607(b) because they are not charges for "settlement services." That is incorrect. HUD has consistently interpreted RESPA to include loan discount fees as charges for settlement services. For example, beginning in 1975, HUD identified (i) fees charged for processing or originating a loan and (ii) loan discount fees (*i.e.*, points) as "settlement charges" that were required to be recorded separately on lines 801 and 802 of the HUD-1 form. 40 Fed. Reg. 22,456 (1975) (24 C.F.R. Pt. 82, App. A (1976)); see 41 Fed. Reg. at 20,284 (loan origination fee "covers the lender's administrative costs in processing the loan," and loan discount fee is "a one-time charge made by the lender to compensate for making a loan at a lower interest rate than would be otherwise charged").

Notwithstanding HUD's expressed view as to the range of "settlement services" covered by RESPA, the Sixth Circuit reached a contrary conclusion in *United States* v. *Graham Mortgage Corp.*, 740 F.2d 414 (1984). *Graham Mortgage* involved a criminal prosecution in which the defendants were charged with giving and receiving unlawful kickbacks through "the making of mortgage loans at a reduced charge of points in ex-

change for referrals of mortgage loan applicants." *Id.* at 415-416. The defendants argued that RESPA did not prohibit their conduct because "the making of a mortgage loan is not 'a real estate settlement service.'" *Id.* at 416. The Sixth Circuit concluded that RESPA's text was ambiguous on that coverage question, *id.* at 417-419; that the legislative history did not resolve the ambiguity, *id.* at 419-421; and that HUD's interpretation of the term "settlement service" as encompassing the making of mortgage loans was not entitled to deference, *id.* at 421-423. The court then applied the rule of lenity and vacated the defendants' convictions. *Id.* at 423.

Congress responded to *Graham Mortgage* by amending RESPA's definition of "settlement services" specifically to include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873 (12 U.S.C. 2602(3)); see H.R. Rep. No. 760, 102d Cong., 2d Sess. 158 (1992) ("[M]ortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute."). HUD's most recent regulations mirror the statutory definition and also include as settlement services the "[p]rovision of any services related to the origination, processing or funding of a federally related mortgage loan." 24 C.F.R. 3500.2(b). Thus, on the HUD-1 form under "Section L. Settlement Charges," line 801 should reflect any fee charged by the lender for originating the loan, "including administrative and processing services," and line 802 should show the "charge (points) for the specific interest rate chosen." 24 C.F.R. Pt. 3500, App. A.

In support of its argument that loan discount fees are not charges for "settlement services," respondent relies on *Wooten* v. *Quicken Loans, Inc.*, 626 F.3d 1187 (2010), petition for cert. pending, No. 11-43 (filed July 6, 2011), in which the Eleventh Circuit held that a loan discount fee is not a charge for a "settlement service" under RESPA. *Id.* at 1189, 1195. *Wooten* is inconsistent with RESPA and with HUD's longstanding interpretation of the statute and regulations governing the required disclosure of settlement charges on the HUD-1 form, 24 C.F.R. Pt. 3500, App. A; see 12 U.S.C. 2603(a). Loan discount fees are charges for a "[s]ettlement service," *i.e.*, the "funding of [a] loan[]." 12 U.S.C. 2602(3).

In any event, neither the court of appeals nor the district court passed upon respondents' proposed alternative ground for dismissal of the complaints, see Pet. App. 4a n.1; *id.* at 66a-67a, 69a, and the issue is not logically antecedent to the question presented by the petition. If the Court grants certiorari and holds that an undivided, unearned fee can violate Section 2607(b), the court of appeals can consider on remand respondent's alternative argument that a loan discount fee is not a charge for a settlement service. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949, 1965 (2010) (reversing court of appeals' judgment "with respect to Congress' power to enact [the statute at issue]," and stating that respondents were free to pursue on remand any other claims they had preserved).

b. Respondent further contends that the loan discount fees charged to petitioners were "conditions of and prerequisites" to funding petitioners' loans, and that the fees were therefore "earned." Br. in Opp. 19-21 (emphasis omitted). According to respondent (*id.* at 21), petitioners are at most complaining that they were "over-

charge[d]" for the reasonable value of their loans. As respondent notes (*ibid.*), all courts of appeals to have considered the issue have concluded that Section 2607(b) does not "impose price controls and therefore does not prohibit 'overcharges.'" *Kruse*, 383 F.3d at 57; see also *Martinez* v. *Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 554 (9th Cir. 2010); *Friedman* v. *Market St. Mortgage Corp.*, 520 F.3d 1289, 1291-1297 (11th Cir. 2008); *Santiago*, 417 F.3d at 387-388.

As explained above, respondent's extension of credit to petitioners—*i.e.*, its origination and processing of the loans—was itself a "real estate settlement service" within the meaning of RESPA. As a "component of the pricing of Petitioners' loans" (Br. in Opp. 20), the discount and origination fees at issue in this case thus bore *some* nexus to settlement services that respondent "actually performed." 12 U.S.C. 2607(b). HUD has long construed Section 2607(b), however, as prohibiting "duplicative" fees—*i.e.*, the imposition of two or more distinct charges for what is in substance the same service. See pp. 3, 4, *supra*. By way of analogy, a "duplicative" fee is "unearned," even though it bears some nexus to a service that is actually rendered, because the buyer receives no added increment of value beyond the service for which he has already paid. Under that approach, although a loan discount fee might be viewed as an overcharge if it is simply exorbitant in relation to the interest-rate reduction it procures, a discount fee that procures *no* interest-rate reduction would be a fee "other than for services actually performed," 12 U.S.C. 2607(b), even if overcharges are assumed to fall outside Section 2607(b)'s coverage.

In any event, contrary to respondent's suggestion (Br. in Opp. 19-21), neither of the courts below made a

finding that the challenged loan discount fees were earned. The district court and the court of appeals concluded that respondent was entitled to summary judgment as a matter of law because respondent did not split the allegedly *unearned* fees with any other party. See Pet. App. 2a, 5a-6a (characterizing this case as involving undivided, unearned fees, not overcharges). That legal conclusion implicates a well-developed circuit split and warrants this Court's review. If this Court grants certiorari and reverses the judgment below, the court of appeals can consider on remand respondent's argument that the loan discount fees were earned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

JOINT APPENDIX

No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN et al.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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APPENDIX A

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Apr. 11, 2008 – Notice of Removal And Attached Petition For Damages By Tammy Foret Freeman And Larry Scott Freeman

Apr. 11, 2008 – Quicken Loans, Inc.'s Answer And Affirmative Defenses To The Freeman Plaintiffs' Petition For Damages

Aug. 8, 2008 – Order Consolidating Civil Action No. 2:08-cv-01627 (Smith, et al. v. Quicken Loans, Inc., et al.)

Sept. 15, 2008 – Quicken Loans, Inc. And Title Source, Inc.'s Motion To Dismiss Freeman Plaintiffs' Petition For Damages Pursuant To Federal Rule of Civil Procedure 12(c)

Sept. 15, 2008 – Notice Of Hearing Of Quicken Loans, Inc. And Title Source, Inc.'s Motion To Dismiss Freeman Plaintiffs' Petition For Damages Pursuant To Federal Rule of Civil Procedure 12(c)

Sept. 15, 2008 – Quicken Loans, Inc. And Title Source, Inc.'s Motion To Dismiss Smith Plaintiffs' Petition For Damages Pursuant To Federal Rule of Civil Procedure 12(c)

Sept. 15, 2008 – Notice Of Hearing Of Quicken Loans, Inc. And Title Source, Inc.'s Motion To Dismiss Smith Plaintiffs' Petition For Damages

Pursuant To Federal Rule of Civil Procedure 12(c)

Oct. 8, 2008 – Order Continuing Status Conference Until Motion For Removal Is Decided

Oct. 28, 2008 – Quicken Loans, Inc.'s Consent Motion To Remove Motions To Dismiss From November 5, 2008 Hearing Docket

Oct. 29, 2008 – Order Granting Quicken Loans, Inc.'s Consent Motion To Remove Motions To Dismiss From November 5, 2008 Hearing Docket And Denying Quicken Loans, Inc. And Title Source, Inc.'s Motions To Dismiss Pursuant To Federal Rule of Civil Procedure 12(c) Without Prejudice

Nov. 25, 2008 – Order Consolidating Civil Action No. 2:08-cv-04774 (John J. Bennett, III, et al. v. Quicken Loans, Inc., et al.)

Feb. 6, 2009 – Quicken Loans, Inc.'s Motion To Temporarily Stay All Class Certification Proceedings And Class-Related Discovery Pending Resolution of Dispositive Motion

Feb. 13, 2009 – Plaintiffs' Memorandum In Opposition To Quicken Loans, Inc.'s Motion To Temporarily Stay All Class Certification Proceedings And Class-Related Discovery Pending Resolution of Dispositive Motion And Response to Quicken Loans, Inc.'s Request for Oral Argument

Feb. 17, 2009 – Quicken Loans, Inc.'s Motion For

Summary Judgment Against The Smith Plaintiffs

Feb. 17, 2009 – Quicken Loans, Inc.'s Memorandum In Support of Motion For Summary Judgment Against The Smith Plaintiffs

Feb. 17, 2009 – Quicken Loans, Inc.'s Statement Of Uncontested Materials Facts In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs (Attachment To Motion For Summary Judgment)

Feb. 17, 2009 – Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs (Attachment To Motion For Summary Judgment)

Feb. 17, 2009 – Affidavit Of Jeffrey K. Eisenshtadt In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs (Attachment To Motion For Summary Judgment)

Feb. 17, 2009 – Quicken Loans, Inc.'s Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs

Feb. 17, 2009 – Quicken Loans, Inc.'s Memorandum In Support of Quicken Loans, Inc's Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs

Feb. 17, 2009 – Quicken Loans, Inc.'s Statement of Uncontested Material Facts In Support Of The

Motion For Summary Judgment Against the Freeman and Bennett Plaintiffs (Attachment To Motion For Summary Judgment)

Feb. 17, 2009 – Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs (Attachment To Motion For Summary Judgment)

Mar. 3, 2009 – Order Granting Quicken Loans, Inc.'s Motion To Temporarily Stay All Class Certification Proceedings And Class-Related Discovery Pending Resolution of Dispositive Motion

Mar. 24, 2009 – Smith, Freeman and Bennett Plaintiffs' Responses To Quicken Loans Inc.'s Motions For Summary Judgment With Supporting Attachments

Mar. 24, 2009 – Smith Plaintiffs' Response To Defendants' Statement Of Uncontested Material Facts (Attachment To Plaintiffs' Responses To Quicken Loans Inc.'s Motions For Summary Judgment)

Mar. 24, 2009 – Freeman And Bennett Plaintiffs' Response To Defendants' Statement Of Uncontested Material Facts (Attachment To Plaintiffs' Responses To Quicken Loans Inc.'s Motions For Summary Judgment)

Mar. 26, 2009 – Order Cancelling Oral Argument As To Quicken Loans, Inc.'s Motions For Summary

Judgment Against Smith, Freeman And Bennett Plaintiffs And Setting Hearing For Apr. 1, 2009 On The Briefs

Apr. 1, 2009 – Order Granting Quicken Loans Inc.'s Motions For Leave To File Reply Memoranda In Support Of Quicken Loans Inc.'s Motions For Summary Judgment Against Smith, Freeman And Bennett Plaintiffs And Motion For Leave To File Excess Pages of Reply Memoranda

Apr. 1, 2009 – Quicken Loans Inc.'s Reply Memorandum In Support Of Its Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs

Apr. 1, 2009 – Quicken Loans, Inc.'s Reply Memorandum In Support Of Its Motion For Summary Judgment Against The Smith Plaintiffs

Aug. 10, 2009 – Order Granting Quicken Loans, Inc.'s Motions For Summary Judgment Against The Smith, Freeman, And Bennett Plaintiffs

Aug. 11, 2009 – Judgment In Favor Of Quicken Loans Inc. Against The Smith, Freeman, And Bennett Plaintiffs

Sept. 21, 2009 – Plaintiffs' Appeal Transcript Request

Sept. 25, 2009 – Certified And Transcript Record On Appeal

Oct. 9, 2009 – 4 Volumes Of Original Record

Oct. 13, 2011 – Certified And Transmitted Record On Appeal To US Supreme Court

APPENDIX B

Petition For Damages By Tammy Foret Freeman And Larry Scott Freeman, Originally Filed February 19, 2008, Removed April 11, 2008

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

PETITION FOR DAMAGES

The petition of Tammy Foret Freeman and Larry Scott Freeman, residents of Terrebonne Parish, State of Louisiana, with respect represents:

1.

Made defendant herein is QUICKEN LOANS, INC., (hereinafter referred to as "Quicken Loans"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered agent of service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808.

2.

Made defendant herein is TITLE SOURCE, INC., (hereinafter referred to as "Title Source"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered agent for the service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808. Upon information and belief, Title Source does business under the assumed name of "TSI Appraisal Services."

3.

This Court has jurisdiction over this action and venue is proper because the property upon which the mortgage loan was placed is located in this judicial district, and the illegal charges were incurred in this judicial district. Plaintiffs suffered the damages alleged herein in Terrebonne Parish. The Plaintiffs stipulate that the amount in controversy does not exceed Seventy-Five Thousand ($75,00.0.00) Dollars, exclusive of interest and costs.

4.

On February 14, 2007, Tammy and Larry Freeman entered into a mortgage transaction with Quicken Loans, Inc. The loan was obtained in a consumer credit transaction and was primarily for personal, family or household purposes, and the mortgage was secured by the Plaintiffs' dwelling. The note and mortgage that the Plaintiffs entered into with Quicken Loans created a "federally related mortgage loan" as defined at 12 U.S.C. § 2602(1).

5.

Quicken Loans charged the Plaintiffs, as indicated on the HUD-1 statement, a loan discount fee of $980.00 - an amount equal to 1% of their loan amount. The Plaintiffs show that they did not negotiate for a buy-down of the interest rate with Quicken Loans, nor did they receive a lower interest rate in return for paying the loan discount fees.

6.

Plaintiffs show that a loan discount fee, often called "points" or "discount points", is a one-time charge imposed by a lender to lower the interest rate at which the lender would otherwise offer the loan. Plaintiffs were charged an amount denominated as "loan discount" fees on their HUD-1 by Quicken Loans, but show that they did not receive a concomitant reduction in their interest rate. On information and belief, the loan discount fees charged to the Plaintiffs did not result in a lower interest rate for the Plaintiffs' loan.

7.

Plaintiffs also show that they were charged $300 for an appraisal of their residence by a local real estate appraiser, and an additional $80 fee with only a reference to "TSI Appraisal Services" on the HUD-1 statement.

8.

Plaintiffs' claims arise, in part, under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.*, in connection with Quicken Loans' imposition of a loan discount fee for which no service was provided, and no interest rate discount was given or bargained for in connection with their loan, and in connection with fees charged by Title Source d/b/a TSI Appraisal Services in that the fee was split and/or TSI Appraisal Services provided no, nominal, or duplicative work in connection with the Plaintiffs' loan for the $80 fee incurred and/or the $80 fee was in excess of the reasonable value of goods

or facilities provided for the services actually performed by Title Source, all in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601, *et seq.*

9.

RESPA requires the lender to provide the borrower a settlement statement which shall "conspicuously and clearly itemize all charges imposed upon the borrower. . . in connection with the settlement." 12 U.S.C. § 2603(a).

10.

Plaintiffs aver that Quicken Loans disguised unearned fees by calling them discount points on the Plaintiffs' HUD-1. Although the Plaintiffs' HUD-1 showed an amount on line 802 as loan discount fees or points, they are in actuality bogus charges and/or fees, the purpose of which was to increase unearned compensation for Quicken Loans.

11.

RESPA prohibits unearned fees: "No person shall give and no person shall accept any portion, split, or percentage of any charge, made of received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

12.

A consumer reviewing his or her HUD-1 without the benefit of a Quicken Loan price list and rate sheet would be unable to determine that he or

she had been overcharged for loan discount fees or the true purpose of the unearned fees.

13.

Plaintiffs exercised reasonable diligence during their loan transactions and dealings with Quicken Loans and in reviewing their loan documentation, they could not have, nor been reasonably expected to, uncover the true facts.

14.

Plaintiffs were entitled to have their federally related mortgage transaction closed without charges being imposed for services not performed, and without charges in excess of the amount allowed by RESPA.

15.

Plaintiffs aver that the Defendants' lending scheme, as described above, violates RESPA at 12 U.S.C. § 2607.

16.

Plaintiffs aver that the section 802 (loan discount) and 888 (TSI Appraisal Services) charges listed on their HUD-1 were imposed for services that were not bona fide, not rendered, not paid or were for nominal, unreasonable or duplicative services for which no fees were earned and for which no fees should have been imposed, all in violation of RESPA at 12 U.S.C. § 2607, and RESPA's implementing regulations, Regulation X, at 24 C.F.R. § 3500.14.

17.

As a result of the RESPA violations alleged above, Plaintiffs have been damaged in an amount to be determined at a trial of this action, where they will seek all permissible damages, including, but not limited to, compensatory damages, treble damages, costs, interest and reasonable attorneys' fees.

18.

Plaintiffs further show that the parties entered into a mortgage and loan contract.

19.

Plaintiffs aver that the Defendants have breached the contract(s) they entered into with the Plaintiffs by charging and collecting unearned loan discount fees and appraisal fees. The Plaintiffs show that they have been damaged as a result of the breach of contract(s) and they are entitled to damages as a result of the breach(es) as provided by law.

20.

Plaintiffs aver that they have paid a thing or debt not owed to the Defendants in the form of unearned loan discount fees and appraisal fees, and therefore, the Defendants are obligated to return those unearned fees to the Plaintiffs.

21.

Plaintiffs aver that the Defendants have been unjustly enriched in the charging and collecting of unearned loan discount fees and appraisal fees from the Plaintiffs, and therefore, the Defendants are

obligated to return the unearned fees to the Plaintiffs.

WHEREFORE, Plaintiffs pray that Defendants Quicken Loans, Inc., and Title Source, Inc., be served with a copy of this petition and cited to appear and answer same, and, that after all due proceedings had, there be a judgment herein in favor of the Plaintiffs and awarding the Plaintiffs all compensatory, statutory and treble damages provided under applicable law, as well as for all costs of this suit and for legal interest, including attorneys' fees, if applicable, and all just and equitable relief.

BY ATTORNEYS:

[Attorneys for Plaintiffs]

[Signatures and Certificates of Service Omitted]

APPENDIX C

Quicken Loans, Inc.'s Answer And Affirmative Defenses To The Freeman Plaintiffs' Petition For Damages, Dated April 11, 2008

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

QUICKEN LOANS, INC.'S ANSWER AND AFFIRMATIVE DEFENSES TO THE PLAINTIFFS' PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes Quicken Loans, Inc. ("Quicken Loans"), who submits its answers and defenses to the Petition for Damages ("Petition") filed by the plaintiffs, Tammy Foret Freeman and Larry Scott Freeman ("Plaintiffs"), in the above-captioned matter. Quicken Loans, with full reservation of its defenses, and with respect, represents as follows:

FIRST AFFIRMATIVE DEFENSE

The Petition fails to state a claim or cause of action against Quicken Loans upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

AND NOW, for answer to the separate allegations contained in Plaintiffs' Petition, Quicken Loans avers as follows:

INTRODUCTORY PARAGRAPH

In response to the first un-numbered Introductory Paragraph of the Petition, Quicken Loans denies that Plaintiffs are residents of Terrebonne Parish, State of Louisiana, for lack of information sufficient to justify a belief therein. The remaining allegations of the first un-numbered Introductory Paragraph do not require a response from Quicken Loans.

I.

Quicken Loans admits the allegations contained in Paragraph 1 of the Petition.

II.

The allegations contained in Paragraph 2 of the Petition are not direct to and require no response from Quicken Loans. To the extent that a response may be required, Quicken Loans denies said allegations for lack of information sufficient to justify a belief therein.

III.

The allegations contained in Paragraph 3 of the Petition concerning jurisdiction, venue, illegal charges, and damages state legal conclusions to which no response is required. Quicken Loans specifically denies that there were any illegal charges collected in connection with the Plaintiffs' mortgage loan and that any damages were suffered by the Plaintiffs. In the alternative, if the Plaintiffs sustained any damages, which is specifically denied, Quicken Loans admits that the amount in

controversy does not exceed $75,000, as so stipulated by the Plaintiffs.

IV.

In response to the allegations contained in Paragraph 4 of the Petition, Quicken Loans admits that the Plaintiffs executed a promissory note and mortgage in favor of Quicken Loans on February 14, 2007. The remaining allegations contained in Paragraph 4 of the Petition state legal conclusions and include terms with specific legal meaning to which no response is required. To the extent that a response may be required, Quicken Loans submits that the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, is the best evidence of its terms, and Quicken Loans denies all allegations that conflict with RESPA. Quicken Loans further denies all allegations of fact contained in Paragraph 4 of the Petition.

V.

In response to the allegations contained in Paragraph 5 of the Petition, Quicken Loans admits that it collected $980.00 in loan discount fees from the Plaintiffs, as disclosed on the HUD-1 Settlement Statement. Quicken Loans denies the remaining allegations contained in Paragraph 5 of the Petition.

VI.

The allegations contained in Paragraph 6 of the Petition state legal conclusions regarding the meaning of "points" and "discount points" to which no response is required. Quicken Loans admits that it collected $980.00 in loan discount fees from the

Plaintiffs in connection with their February 14, 2007 loan, as disclosed on the HUD-1 Settlement Statement. Quicken Loans denies the remaining allegations contained in Paragraph 6 of the Petition.

VII.

In response to the allegations contained in Paragraph 7 of the Petition, Quicken Loans admits that the HUD-1 Settlement Statement accurately reflects settlement service charges payable to Brian LaRose Appraisal in the amount of $300.00 and to TSI Appraisal Services in the amount of $80.00. Quicken Loans denies the remaining allegations contained in Paragraph 7 of the Petition.

VIII.

The allegations contained in Paragraph 8 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans also specifically denies that it violated RESPA and specifically denies all allegations of fact contained in Paragraph 8 of the Petition.

IX.

The allegations contained in Paragraph 9 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken

Loans denies all allegations that are inconsistent therewith.

X.

Quicken Loans denies the allegations contained in Paragraph 10 of the Petition.

XI.

The allegations contained in Paragraph 11 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith.

XII.

Quicken Loans denies the allegations contained in Paragraph 12 of the Petition.

XIII.

Quicken Loans denies the allegations contained in Paragraph 13 of the Petition.

XIV.

The allegations contained in Paragraph 14 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 14 of the Petition.

XV.

The allegations contained in Paragraph 15 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 15 of the Petition.

XVI.

The allegations contained in Paragraph 16 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 16 of the Petition.

XVII.

The allegations contained in Paragraph 17 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 17 of the Petition.

XVIII.

In response to the allegations contained in Paragraph 18 of the Petition, Quicken Loans admits that the Plaintiffs executed a promissory note and mortgage on February 14, 2007 in favor of Quicken Loans. Quicken Loans denies that co-defendant Title Source was a party to either the afore-described promissory note or mortgage.

XIX.

The allegations contained in Paragraph 19 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 19 of the Petition.

XX.

The allegations contained in Paragraph 20 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 20 of the Petition.

XXI.

The allegations contained in Paragraph 21 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 21 of the Petition.

XXII.

Quicken Loans denies the allegations contained in the unnumbered Paragraph of the Petition entitled beginning with "WHEREFORE," and all subparts thereto.

XXIII.

THIRD AFFIRMATIVE DEFENSE

Quicken Loans denies all allegations in the Petition that were not heretofore admitted.

FOURTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the applicable statute of limitations, prescriptive and peremptive periods, and/or laches as is evident on the face of the Petition.

FIFTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the doctrines of accord and satisfaction.

SIXTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the doctrines of waiver, ratification, unclean hands and/or estoppel.

SEVENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are subject to any rights or setoff and/or recoupment that Quicken Loans may have.

EIGHTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the statute of frauds and/or the parol evidence rule.

NINTH AFFIRMATIVE DEFENSE

At all relevant times, Quicken Loans acted in accordance with any and all of its obligations to the Plaintiffs, and the laws of the State of Louisiana and of the United States of America.

TENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with all applicable contracts, laws and regulations.

ELEVENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with RESPA.

TWELFTH AFFIRMATIVE DEFENSE

The Plaintiffs' claims against Quicken Loans are improperly brought under RESPA and should be dismissed accordingly.

THIRTEENTH AFFIRMATIVE DEFENSE

Quicken Loans did not give or accept any portion, split, or percentage of any charge made or

received for the rendering of a real estate settlement service in connection with the Plaintiff's mortgage loan other than for services actually performed.

FOURTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs have not sustained any damages proximately caused by Quicken Loans.

FIFTEENTH AFFIRMATIVE DEFENSE

Some or all of the Plaintiffs' state law claims (to the extent that any have been properly alleged, which is denied) may be preempted.

SIXTEENTH AFFIRMATIVE DEFENSE

Any damages sustained by the Plaintiffs (the existence of which damages is denied) were the result of acts or omissions of persons other than Quicken Loans, for which Quicken Loans is not legally responsible.

SEVENTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs have failed to mitigate any damages they incurred (the existence of which damages is denied).

EIGHTEENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs should be dismissed, or alternatively, their damages (which purported claims and damages are hereby expressly denied) should be reduced due to Plaintiffs' own negligent and/or wrongful conduct and/or own breach of contract, and/or conduct of third parties.

NINETEENTH AFFIRMATIVE DEFENSE

The rights, obligations and duties of Quicken Loans to the Plaintiffs are exclusively defined by contract.

TWENTIETH AFFIRMATIVE DEFENSE

The terms, conditions, and provisions of the documents memorializing the Plaintiffs' alleged agreement(s) with Quicken Loans are specifically and affirmatively pled herein, as if set forth herein in full, which terms, conditions and provisions act to bar and/or limit the claims of the Plaintiffs.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The Plaintiffs have failed to plead fraud with specificity, as needed to establish equitable tolling, as required by Rule 9 of the Federal Rules of Civil Procedure.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Quicken Loans did not conceal any fact regarding the fees collected in connection with the Plaintiffs' February 14, 2007 promissory note and mortgage.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Quicken Loans reserves the right to assert any additional affirmative defenses that may be discovered during the course of additional investigation and discovery.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Quicken Loans further answers by asserting the responses raised in this Answer as defenses.

WHEREFORE, Quicken Loans Loans, Inc. respectfully prays that this Answer and Affirmative Defenses be deemed good and sufficient and that after due proceedings are had, there be judgment herein in its favor, dismissing the Petition for Damages filed by Plaintiffs, Tammy Foret Freeman and Larry Scott Freeman, with prejudice, at Plaintiffs' costs, granting Quicken Loans its attorneys' fees, and all such relief to which Quicken Loans is entitled.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX D

Petition For Damages By John J. Bennett And Stacey B. Bennett, Originally Filed May 27, 2008, Removed October 31, 2008, Consolidated November 25, 2008

In Civil Action No. 2:08-cv-01626 (consolidated from Civil Action No. 2:08-cv-04774)

[Caption Omitted]

PETITION FOR DAMAGES

The Plaintiffs, John J. Bennett, III, and Stacey B. Bennett, each individually, and on behalf of all others similarly situated, bring this action against the defendants, Title Source, Inc., and Quicken Loans, Inc. Plaintiffs allege the following on information and belief, formed after a reasonable inquiry under the circumstances.

1.

Plaintiffs John and Stacey Bennett were at all times material hereto, residents of Terrebonne Parish, State of Louisiana. Plaintiffs have suffered injury in fact as a result of Defendants' conduct.

2.

Made defendant herein is TITLE SOURCE, INC., (hereinafter referred to as "Title Source"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered-agent for the service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808. Upon information and belief, Title

Source does business under the assumed name of "TSI Appraisal Services."

3.

Made defendant herein is QUICKEN LOANS, INC., (hereinafter referred to as "Quicken Loans"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered agent for the service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808.

4.

This Court has jurisdiction over this action and venue is proper because the property upon which the mortgage loan was placed is located in this judicial district, and the illegal charges were incurred in this judicial district. Plaintiffs suffered the damages alleged herein in Terrebonne Parish. The Plaintiffs stipulate that the amount in controversy does not exceed Seventy-Five Thousand ($75,000.00) Dollars, exclusive of interest and costs, per putative class member.

5.

On May 29, 2007, John and Stacey Freeman entered into a loan/mortgage transaction with Quicken Loans, Inc. The loan was obtained in a consumer credit transaction and was primarily for personal, family or household purposes, and the mortgage was secured by the Plaintiffs' dwelling. The note and mortgage that the Plaintiffs entered into with Quicken Loans created a "federally related mortgage loan" as defined at 12 U.S.C. § 2602(1).

6.

Quicken Loans charged the Plaintiffs, as indicated on the HUD-1 statement, a loan discount fee of $1,100.00 - an amount equal to 1.25% of their loan amount. The Plaintiffs show that they did not negotiate for a buy-down of the interest rate with Quicken Loans, nor did they receive a lower interest rate in return for paying the loan discount fee.

7.

Plaintiffs show that a loan discount fee, often called "points" or "discount points", is a one-time charge imposed by a lender to lower the interest rate at which the lender would otherwise offer the loan. Plaintiffs were charged an amount denominated as "loan discount fee on their HUD-1 by Quicken Loans, but show that they did not receive a concomitant reduction in their interest rate. On information and belief, the loan discount fee charged to the Plaintiffs did not result in a lower interest rate for the Plaintiffs' loan.

8.

Plaintiffs also show that they were charged $300 for an appraisal of their residence by a local real estate appraiser, and an additional $80 fee with only a reference to "TSI Appraisal Services" on the HUD-1 statement.

9.

Plaintiffs' claims arise, in part, under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.*, in connection with Quicken

Loans' imposition of a loan discount fee for which no service was provided, and no interest rate discount was given or bargained for in connection with their loan, and in connection with fees charged by Title Source d/b/a TSI Appraisal Services in that the fee was split and/or TSI Appraisal Services provided no, nominal, or duplicative work in connection with the Plaintiffs' loan for the $80 fee incurred and/or the S80 fee was in excess of the reasonable value of goods or facilities provided for the services actually performed by Title Source, all in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601, *et seq.*

10.

RESPA requires the lender to provide the borrower a settlement statement which shall "conspicuously and clearly itemize all charges imposed upon the borrower...in connection with the settlement." 12 U.S.C. § 2603(a).

11.

Plaintiffs aver that Quicken Loans disguised unearned fees by calling them loan discount fees on the Plaintiffs' HUD-1. Although the Plaintiffs' HUD-1 Settlement Statement showed an amount on line 802 as loan discount fees, they are in actuality bogus charges and/or fees, the purpose of which was to increase unearned compensation for Quicken Loans.

12.

RESPA prohibits unearned fees: "No person shall give and no person shall accept any portion,

split, or percentage of any charge, made of received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

13.

A consumer reviewing his or her HUD-1 without the benefit of a Quicken Loan price list and rate sheet would he unable to determine that he or she had been overcharged for loan discount fees or the true purpose of the unearned fees.

14.

Plaintiffs exercised reasonable diligence during their loan transactions and dealings with Quicken Loans; however, in reviewing their loan documentation, they could not have, nor been reasonably expected to, uncover the true facts.

15.

Plaintiffs were entitled to have their federally related mortgage transaction closed without charges being imposed for services not performed, and without charges in excess of the amount allowed by RESPA.

16.

Plaintiffs aver that the Defendants' lending scheme, as described above, violates RESPA at 12 U.S.C. § 2607.

17.

Plaintiffs aver that the section 802 (loan discount) and 888 (TSI Appraisal Services) charges listed on their HUD-1 Settlement Statement were imposed for services that were not bona fide, not rendered, not paid or were for nominal, unreasonable or duplicative services for which no fees were earned and for which no fees should have been imposed, all in violation of RESPA at 12 U.S.C. § 2607, and RESPA's implementing regulations, Regulation X, at 24 C.F.R. § 3500.14.

18.

As a result of the RESPA violations alleged above, Plaintiffs have been damaged in an amount to be determined at a trial of this action, where they will seek all permissible damages, including, but not limited to, compensatory damages, treble damages, costs, interest and reasonable attorneys' fees.

19.

Plaintiffs further show that the parties entered into a mortgage and loan contract.

20.

The Plaintiffs are entitled to have this case maintained as a class action, pursuant to Louisiana Code of Civil Procedure, Article 591, *et seq.* The proposed sub-classes would be defined as follows at this time, but are subject to modification as additional facts are obtained in discovery:

Sub-Class One (Loan Discount Fees Restitution/Damage):

All individuals who entered into a loan/mortgage transaction with Quicken Loans, Inc., while the individuals were domiciled in Louisiana, and paid a "Loan Discount Fee" to Quicken Loans, Inc., in conjunction with the transaction, with a settlement date for the transaction on or after May 22, 2007.

Sub-Class Two (TSI Appraisal Services Fees Restitution/Damage):

All individuals who entered into a loan/mortgage transaction with Quicken Loans, Inc., while the individuals were domiciled in Louisiana, and paid fees for "TSI Appraisal Services" in conjunction with the transaction, with a settlement date for the transaction on or after May 22, 2007.

Excluded from both sub-classes are Defendants, their owners, officers, directors, subsidiaries, and any person or other entity related to, affiliated with, or employed by Defendants.

21.

Plaintiffs are entitled to have this cause of action maintained as a class action, pursuant to Louisiana Code of Civil Procedure article 591 et seq., for the following non-exclusive reasons:

(a) The persons constituting the sub-classes are so numerous that individual joinder of all parties is impracticable;

(b) The named plaintiffs are representative of the plaintiff sub-class members and are so situated as to provide adequate representation for the unnamed plaintiff sub-class members;

(c) The great majority of the unnamed plaintiff sub-class members have no substantial interest in individually controlling the prosecution of their separate actions;

(d) There are common questions and issues of law and fact involved in this matter which predominate over questions affecting individual sub-class members;

(e) Any defenses or theories of resistance to liability set forth by the Defendants would be applicable to all claims presented by members of the plaintiff sub-classes; and,

(f) The prosecution of separate actions by individual plaintiff subclass members will create a serious risk of inconsistent or varying adjudications which may prejudicially affect the claims of the other sub-class members and subsequent litigation.

22.

The class action is a superior procedural vehicle for this litigation because the primary objective of the class action, economies of time, effort and expense, will be achieved and the class action

may be more easily managed than some other procedural vehicle considering the opportunity to afford reasonable notice of significant phases of the litigation.

23.

The claims or defenses of the representative parties are typical of the claims or defenses applicable to the sub-classes.

24.

Plaintiffs have retained counsel who are competent in the prosecution of this type of litigation.

25.

There are common questions of law and fact that predominate over any questions affecting only individual sub-class members. Said common questions include, but are not limited to, the following: (1) whether Defendants have systematically violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601, *et seq.*, by charging and collecting loan discount fees for which no service was provided, and no interest rate discount was given or bargained for in connection with the loans; and, in connection with fees charged by Title Source d/b/a TSI Appraisal Services, in that the fee was split and/or TSI Appraisal Services provided no, nominal, or duplicative work in connection with fees charged and/or the fees were in excess of the reasonable value of goods or facilities provided for the services actually performed by Title Source; (2) whether the Restitution/Damages Sub-

Class members are entitled to restitution and/or damages for fees wrongfully collected from them; (3) whether Defendants were unjustly enriched by charging and collecting loan discount fees for which no service was provided, and no interest rate discount was given or bargained for in connection with the loans, and in connection with fees charged by Title Source d/b/a TSI Appraisal Services in that the fee was split and/or TSI Appraisal Services provided no, nominal, or duplicative work in connection with fees charged and/or the fees were in excess of the reasonable value of goods or facilities provided for the services actually performed by Title Source; and (4) whether Plaintiffs and the sub-class members are entitled to reasonable attorney fees, court costs and reasonable expenses associated with the filing of this litigation.

26.

Because of the size of some of the individual sub-class member's claims, few, if any, sub-class members could afford to seek legal action for the wrongs complained of herein.

27.

Plaintiffs and the sub-class members aver that the Defendants have breached the contract(s) they entered into with them by charging and collecting unearned loan discount fees and/or appraisal services fees. The Plaintiffs and the sub-class members show that they have been damaged as a result of the breach of contracts, and they are entitled to damages as a result of the breaches as provided by law.

28.

Plaintiffs and the sub-class members aver that they have paid a thing or debt not owed to the Defendants in the form of unearned loan discount fees and/or appraisal services fees, and therefore, the Defendants are obligated to return those unearned fees to the Plaintiffs and the subclass members.

29.

Plaintiffs and the sub-class members aver that the Defendants have been unjustly enriched in the charging and collecting of unearned loan discount fees and/or appraisal services fees from them, and therefore, the Defendants are obligated to return the unearned fees to the Plaintiffs and the sub-class members.

30.

Plaintiffs pray for a trial by jury on all issues.

WHEREFORE, Plaintiffs, John J. Bennett, III, and Stacey B. Bennett pray that Defendants, Title Source, Inc., and Quicken Loans, Inc., be served with a copy of this petition and be cited to appear and answer same, and after all legal delays and due proceedings had, that there be judgment entered herein as follows;

(i) That Defendants be served with a copy of this petition, and after due proceedings that this case be certified as a class action;

(ii) That Plaintiffs and members of the sub-classes be awarded restitution and/or

monetary damages as afforded by law, and where applicable;

(iii) That Plaintiffs and members of the sub-classes be awarded statutory damages and penalties, as afforded by law, and where applicable;

(iv) That Plaintiffs and the members of the sub-classes be awarded the costs incurred in bringing this action, together with reasonable attorneys' fees and expenses including expert fees and interest; and,

(v) That Plaintiffs be awarded all other legal and equitable relief as the case may permit, and a trial by jury on all issues.

BY ATTORNEYS:

[Attorneys for Plaintiffs]

[Signatures and Certificates of Service Omitted]

APPENDIX E

Quicken Loans, Inc.'s Answer And Affirmative Defenses To The Bennett Plaintiffs' Petition For Damages, Dated October 31, 2008

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

QUICKEN LOANS, INC.'S ANSWER AND AFFIRMATIVE DEFENSES TO THE PLAINTIFFS' PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes Quicken Loans, Inc. ("Quicken Loans"), who submits its answers and defenses to the Petition for Damages ("Petition") filed by the plaintiffs, John J. Bennett and Stacey B. Bennett ("Plaintiffs"), in the above-captioned matter. Quicken Loans, with full reservation of its defenses, and with respect, represents as follows:

FIRST AFFIRMATIVE DEFENSE

The Petition fails to state a claim or cause of action against Quicken Loans upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

AND NOW, for answer to the separate allegations contained in Plaintiffs' Petition, Quicken Loans avers as follows:

INTRODUCTORY PARAGRAPH

The first unnumbered Paragraph of the Petition does not require a response from Quicken Loans.

I.

In response to the Paragraph 1 of the Petition, Quicken Loans denies that Plaintiffs are residents of Terrebonne Parish, State of Louisiana, for lack of information sufficient to justify a belief therein. The remaining allegations of Paragraph 1 are denied.

II.

The allegations contained in Paragraph 2 of the Petition are not direct to and require no response from Quicken Loans. To the extent that a response may be required, Quicken Loans denies said allegations for lack of information sufficient to justify a belief therein.

III.

Quicken Loans admits the allegations contained in Paragraph 3 of the Petition.

IV.

The allegations contained in Paragraph 4 of the Petition concerning jurisdiction, venue, illegal charges, and damages state legal conclusions to which no response is required. Quicken Loans specifically denies that there were any illegal charges collected in connection with the Plaintiffs' mortgage loan and that any damages were suffered by the Plaintiffs. In the alternative, if the Plaintiffs sustained any damages, which is specifically denied,

Quicken Loans admits that the amount in controversy per putative class member does not exceed $75,000, as so stipulated by the Plaintiffs. Quicken Loans admits that the property upon which the mortgage loan was placed is in Terrebonne Parish.

V.

In response to the allegations contained in Paragraph 5 of the Petition [and provided that the Petition intended to say John and Stacey Bennett, not John and Stacey Freeman], Quicken Loans admits that the Plaintiffs executed a promissory note and mortgage in favor of Quicken Loans on May 29, 2007. The remaining allegations contained in Paragraph 5 of the Petition state legal conclusions and include terms with specific legal meaning to which no response is required. To the extent that a response may be required, Quicken Loans submits that the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, is the best evidence of its terms, and Quicken Loans denies all allegations that conflict with RESPA. Quicken Loans further denies all allegations of fact contained in Paragraph 5 of the Petition.

VI.

In response to the allegations contained in Paragraph 6 of the Petition, Quicken Loans admits that it collected $1,100.00 in loan discount fees from the Plaintiffs, as disclosed on the HUD-1 Settlement Statement. Quicken Loans denies the remaining allegations contained in Paragraph 6 of the Petition.

VII.

The allegations contained in Paragraph 7 of the Petition state legal conclusions regarding the meaning of "points" and "discount points" to which no response is required. Quicken Loans admits that it collected $1,100.00 in loan discount fees from the Plaintiffs in connection with their May 29, 2007 loan, as disclosed on the HUD-1 Settlement Statement. Quicken Loans denies the remaining allegations contained in Paragraph 7 of the Petition.

VIII.

In response to the allegations contained in Paragraph 8 of the Petition, Quicken Loans admits that the HUD-1 Settlement Statement accurately reflects settlement service charges payable to a local real estate appraiser in the amount of $300.00 and to TSI Appraisal Services in the amount of $80.00. Quicken Loans denies the remaining allegations contained in Paragraph 8 of the Petition.

IX.

The allegations contained in Paragraph 9 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans also specifically denies that it violated RESPA and specifically denies all allegations of fact contained in Paragraph 9 of the Petition.

X.

The allegations contained in Paragraph 10 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith.

XI.

Quicken Loans denies the allegations contained in Paragraph 11 of the Petition.

XII.

The allegations contained in Paragraph 12 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith.

XIII.

Quicken Loans denies the allegations contained in Paragraph 13 of the Petition.

XIV.

Quicken Loans denies the allegations contained in Paragraph 14 of the Petition.

XV.

The allegations contained in Paragraph 15 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken

Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 15 of the Petition.

XVI.

The allegations contained in Paragraph 16 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 16 of the Petition.

XVII.

The allegations contained in Paragraph 17 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 17 of the Petition.

XVIII.

The allegations contained in Paragraph 18 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all

allegations of fact contained in Paragraph 18 of the Petition.

XIX.

In response to the allegations contained in Paragraph 19 of the Petition, Quicken Loans admits that the Plaintiffs executed a promissory note and mortgage on May 29, 2007 in favor of Quicken Loans. Quicken Loans denies that co-defendant Title Source was a party to either the afore-described promissory note or mortgage.

XX.

The allegations contained in Paragraph 20 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies that Plaintiffs are entitled to have this case maintained as a class action.

XXI.

The allegations contained in Paragraph 21, including subparts a – f, of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 21, including subparts a – f, of the Petition, and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXII.

The allegations contained in Paragraph 22 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 22 of the

Petition, and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXIII.

The allegations contained in Paragraph 23 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 23 of the Petition, and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXIV.

The allegations contained in Paragraph 24 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 24 of the Petition, and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXV.

The allegations contained in Paragraph 25 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 25 and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXVI.

Quicken Loans denies all allegations of fact contained in Paragraph 26 of the Petition for lack of

sufficient information to justify a belief therein and specifically deny that Plaintiffs are entitled to have this case maintained as a class action.

XXVII.

The allegations contained in Paragraph 27 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 27 of the Petition.

XXVIII.

The allegations contained in Paragraph 28 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 28 of the Petition.

XXIX.

The allegations contained in Paragraph 29 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 29 of the Petition.

XXX.

Paragraph 30 of the Petition does not require a response from Quicken Loans.

XXXI.

Quicken Loans denies the allegations contained in the unnumbered Paragraph of the Petition entitled beginning with "WHEREFORE," and all subparts thereto.

XXXII.

THIRD AFFIRMATIVE DEFENSE

Quicken Loans denies all allegations in the Petition that were not heretofore admitted.

FOURTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members are barred by the applicable statute of limitations, prescriptive and peremptive periods, and/or laches.

FIFTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members are barred by the doctrines of accord and satisfaction.

SIXTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members are barred by the doctrines of waiver, ratification, unclean hands and/or estoppel.

SEVENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members are subject to any rights or setoff and/or recoupment that Quicken Loans may have.

EIGHTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members are barred by the statute of frauds and/or the parol evidence rule.

NINTH AFFIRMATIVE DEFENSE

At all relevant times, Quicken Loans acted in accordance with any and all of its obligations to the Plaintiffs and/or the putative class members, and the laws of the State of Louisiana and of the United States of America.

TENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with all applicable contracts, laws and regulations.

ELEVENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with RESPA.

TWELFTH AFFIRMATIVE DEFENSE

The Plaintiffs' and/or the putative class member's claims against Quicken Loans are improperly brought under RESPA and should be dismissed accordingly.

THIRTEENTH AFFIRMATIVE DEFENSE

Quicken Loans did not give or accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with the Plaintiffs' mortgage loan and the putative class members' mortgage loans other than for services actually performed.

FOURTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs and/or the putative class members have not sustained any damages proximately caused by Quicken Loans.

FIFTEENTH AFFIRMATIVE DEFENSE

Some or all of the Plaintiffs' and/or the putative class members' state law claims (to the extent that any have been properly alleged, which is denied) may be preempted.

SIXTEENTH AFFIRMATIVE DEFENSE

Any damages sustained by the Plaintiffs and/or the putative class members (the existence of which damages is denied) were the result of acts or omissions of persons other than Quicken Loans, for which Quicken Loans is not legally responsible.

SEVENTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs and/or the putative class members have failed to mitigate any damages they incurred (the existence of which damages is denied).

EIGHTEENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs and/or the putative class members should be dismissed, or alternatively, their damages (which purported claims and damages are hereby expressly denied) should be reduced due to Plaintiffs' and/or the putative class members' own negligent and/or wrongful conduct and/or own breach of contract, and/or conduct of third parties.

NINETEENTH AFFIRMATIVE DEFENSE

The rights, obligations and duties of Quicken Loans to the Plaintiffs and/or the putative class members are exclusively defined by contract.

TWENTIETH AFFIRMATIVE DEFENSE

The terms, conditions, and provisions of the documents memorializing the Plaintiffs' and/or the putative class members' alleged agreement(s) with Quicken Loans are specifically and affirmatively pled herein, as if set forth herein in full, which terms, conditions and provisions act to bar and/or limit the claims of the Plaintiffs and/or the putative class members.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The Plaintiffs and/or the putative class members have failed to plead fraud with specificity, as needed to establish equitable tolling, as required by Rule 9 of the Federal Rules of Civil Procedure.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Quicken Loans did not conceal any fact regarding the fees collected in connection with the Plaintiffs' May 29, 2007 promissory note and mortgage or in connection with the putative class members' promissory notes and mortgages.

TWENTY-THIRD AFFIRMATIVE DEFENSE

The Petition fails to state a claim that can be properly prosecuted as a class action against Quicken Loans under the requirements of Rule 23 of the Federal Rules of Civil Procedure.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

This suit should not proceed as a class action because, among other things, the class representatives' claims are not typical of the claims of other putative class members, common questions of law and fact do not predominate, the case is inherently unmanageable as a class action, and a class action is not superior to other available methods for the fair and efficient adjudication of this controversy.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Quicken Loans reserves its rights to assert counterclaims, if and when the putative class becomes certified, in whole or in part, against members of the class who have defaulted under their loan agreements or promissory notes held by any defendant, and have failed to cure the defaults,

unless these defaults are the subject of a prior judgment or are scheduled in a pending bankruptcy case.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Quicken Loans reserves the right to assert counterclaims against any Plaintiff and any member of the putative class who is a debtor in a currently pending bankruptcy proceeding and who has defaulted under his or her loan agreements or promissory notes, and has failed to cure the defaults, if and when such bankruptcy proceeding is dismissed, and/or the automatic stay is lifted as to Quicken Loans.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Quicken Loans reserves the right to amend and/or supplement this Answer and to assert any additional affirmative defenses that may be discovered during the course of additional investigation and discovery.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Quicken Loans further answers by asserting the responses raised in this Answer as defenses.

WHEREFORE, Quicken Loans, Inc. respectfully prays that this Answer and Affirmative Defenses be deemed good and sufficient and that after due proceedings are had, there be judgment herein in its favor, dismissing the Petition for Damages filed by Plaintiffs, John J. Bennett and

Stacey B. Bennett, with prejudice, at Plaintiffs' costs, granting Quicken Loans its attorneys' fees, and all such relief to which Quicken Loans is entitled.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX F

Quicken Loans, Inc.'s Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs, Dated February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come defendants Quicken Loans Inc. ("Quicken Loans") and Title Source, Inc. ("Title Source"), who respectfully move the Court to grant their Motion for Summary Judgment, and to dismiss, with prejudice, all claims asserted by the plaintiffs, Tammy Foret Freeman and Larry Scott Freeman (the "Freemans") and John J. Bennett and Stacey B. Bennett (the "Bennetts") (collectively, the "Plaintiffs"), in the above-captioned matter, based on the following grounds:

I.

The Freemans and Bennetts each allege that that Quicken Loans and Title Source violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"), breached their loan contracts, received payments that were not owed and were unjustly enriched by accepting a loan discount fee and an appraisal services fee. Despite Plaintiffs' allegations, each of these claims fail as a matter of law.

II.

The undisputed material facts establish that

there was no split of the loan discount fees or the appraisal services fees paid by the Freemans or the Bennetts, as is required to establish a claim under Section 8(b) of RESPA. Accordingly, Plaintiffs' RESPA claim fails as a matter of law.

III.

The undisputed material facts also establish that there was no contract, oral or written, between the Freemans or the Bennetts and Title Source. In addition, there is no provision of the loan contracts between the Freemans or the Bennetts and Quicken Loans that could have been breached. Accordingly, Plaintiffs' breach of contract claims fail as a matter of law.

IV.

Further, the loan discount fees and appraisal services fees were conditions of and prerequisites to the extension of credit agreed to and enjoyed by the Freemans and the Bennetts. Therefore, each fee was "owed," making the "enrichment" with "cause." Moreover, the Louisiana Credit Agreement Statute bars each of the Freemans' or the Bennetts' claims that are not based on a written agreement, signed by the parties, expressing consideration and setting forth the terms of the agreement. Consequently, Plaintiffs' payment of a thing not owed and unjust enrichment claims fail as a matter of law.

V.

The reasons in support of this Motion for Summary Judgment are more fully set forth in the supporting memorandum attached hereto, and incorporated herein by reference.

WHEREFORE, Quicken Loans Inc. and Title Source, Inc. respectfully request the Court to grant its Motion for Summary Judgment, and to dismiss, with prejudice, all claims asserted by the Freemans and the Bennetts against Quicken Loans, Inc. and Title Source, Inc. in this case.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX G

Quicken Loans, Inc.'s Statement Of Uncontested Material Facts In Support Of The Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs, Dated February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

STATEMENT OF UNCONTESTED MATERIAL FACTS

Pursuant to Rule 56, Quicken Loans Inc. ("Quicken Loans") and Title Source, Inc. ("Title Source"), respectfully submit the following statement of uncontested material facts in support of their motion for summary judgment.

1. On February 14, 2007, Tammy Foret Freeman and Larry Scott Freeman (the "Freemans") executed a promissory note ("Freeman Note") in the amount of $98,000.00 in favor of Quicken Loans secured by a mortgage ("Freeman Mortgage") on property located at 1425 Highway 55, Montegut, Louisiana 70377 ("Freeman Property"). *See* Affidavit of Michael Lyon, Vice President of Operations, Quicken Loans, Ex. 1, at ¶ 4; Freeman Note, attached to Ex. 1 as Ex. A ("Ex. 1-A"); Freeman Mortgage, attached to Ex. 1 as Ex. B ("Ex. 1-B").

2. In connection with the loan closing, the Freemans paid a $980.00 loan discount fee and an $80.00 appraisal services fee. *See* Freeman Petition, at ¶¶ 5, 7.

3. The payment of the $980.00 loan discount fee and the $80.00 appraisal services fee by the Freemans was a condition of and a prerequisite to Quicken Loans' extension of credit to the Freemans. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 7.

4. The Freemans' $980.00 loan discount fee was paid to and retained solely by Quicken Loans. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 9; Freeman HUD-1 Settlement Statement, Ex. 1-C.

5. The Freemans' $980.00 loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to the Freemans. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 8.

6. The Freemans' $80.00 appraisal services fee was paid to and completely retained by Title Source. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 10; Freeman HUD-1 Settlement Statement, Ex. 1-C; Affidavit of Jeffery K. Eisenshtadt, President of Title Source, Ex. 2, at ¶ 9-10.

7. The Freemans' $80.00 appraisal services fee represents work performed by TSI Appraisal in locating and contacting qualified appraisers, scheduling appointments with the appraiser, reviewing the appraisal report, contacting the appraiser regarding any deficiencies in the report or additional required information, paying the appraiser and otherwise processing the contents of the appraisal for Quicken Loans purposes. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 7.

8. There is no written or oral contract between Title Source and the Freemans. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 5.

9. On May 29, 2007, John J. Bennett and Stacey B. Bennett (the "Bennetts") executed a promissory note ("Bennett Note") in the amount of $88,000.00 in favor of Quicken Loans secured by a mortgage ("Bennett Mortgage") on property located at 706 Mire Street, Houma, Louisiana 70364 ("Bennett Property"). *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 11; Bennett Note, attached to Ex. 1 as Ex. G ("Ex. 1-G"); Bennett Mortgage, attached to Ex. 1 as Ex. H ("Ex. 1-H").

10. In connection with the loan closing, the Bennetts paid a $1,100.00 loan discount fee and an $80.00 appraisal services fee. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 12.

11. The payment of the $1,100.00 loan discount fee and the $80.00 appraisal services fee by the Bennetts was a condition of and a prerequisite to Quicken Loans' extension of credit to the Bennetts. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 14.

12. The Bennetts' $1,100.00 loan discount fee was paid to and retained solely by Quicken Loans. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 16; Bennett HUD-1 Settlement Statement, Ex. 1-I.

13. The Bennetts' $1,100.00 loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to Plaintiffs. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 15.

14. The Bennetts' $80.00 appraisal services fee was paid to and completely retained by Title Source. *See* Affidavit of Michael Lyon, Ex. 1, at ¶ 17; Bennett HUD-1 Settlement Statement, Ex. 1-I; Affidavit of Jeffery K. Eisenshtadt, President of Title Source, Ex. 2, at ¶¶ 16-17.

15. The Bennetts' $80.00 appraisal services fee represents work performed by TSI Appraisal in locating and contacting qualified appraisers, scheduling appointments with the appraiser, reviewing the appraisal report, contacting the appraiser regarding any deficiencies in the report or additional required information, paying the appraiser and otherwise processing the contents of the appraisal for Quicken Loans purposes. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 14.

16. There is no written or oral contract between Title Source and the Bennetts. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 12.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX H

Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs, Filed February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

AFFIDAVIT OF MICHAEL LYON

STATE OF MICHIGAN
COUNTY OF OAKLAND

PERSONALLY APPEARED before me, the undersigned notary in and for the jurisdiction aforesaid,

MICHAEL LYON

who, after being duly sworn, states under oath:

1. My name is Michael Lyon. I am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am employed by Quicken Loans and hold the position of Vice President of Operations.

3. I have made an examination of the records of Quicken Loans Inc. ("Quicken Loans") pertaining to the mortgage account of plaintiffs, Tammy Foret Freeman and Larry Scott Freeman (the "Freemans") and John J. Bennett and Stacey B. Bennett (the "Bennetts"). These records were made

at or near the time of the events described therein by and from information transmitted by persons with knowledge of the events described therein who were routinely acting for Quicken Loans in recording the information described therein. These records were kept in the course of Quicken Loans' regularly conducted business activities, and it was the regular practice of Quicken Loans' business activities to make and keep these records.

4. The records of Quicken Loans reflect that on February 14, 2007, the Freemans executed a promissory note ("Freeman Note") in the amount of $98,000.00 in favor of Quicken Loans secured by a mortgage ("Freeman Mortgage") on property located at 1425 Highway 55, Montegut, Louisiana 70377 ("Freeman Property") (collectively referred to as the "Freeman Loan"). *See* Freeman Note, attached hereto as Ex. A; Freeman Mortgage, attached hereto as Ex. B.

5. In connection with the Freeman Loan, the Freemans paid a $980.00 loan discount fee and an $80.00 appraisal services fee. *See* Freeman HUD-1 Settlement Statement, attached hereto as Ex. C.

6. Both the loan discount fee and the appraisal services fee were disclosed to the Freemans prior to and at the loan closing as evidenced by the following documents: Freeman HUD-1 Settlement Statement, Ex. C; Freeman Good Faith Estimate, Ex. D; Freeman Application, Ex. E; Freeman Interest Rate Disclosure, Ex. F.

7. The payment of the $980.00 loan discount fee and the $80.00 appraisal services fee by

the Freemans was a condition of and a prerequisite to Quicken Loans' extension of credit to the Freemans.

8. The $980.00 loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to the Freemans.

9. The $980.00 loan discount fee paid by the Freemans was paid to and retained solely by Quicken Loans. *See* Freeman HUD-1 Settlement Statement, Ex. C.

10. Quicken Loans did not receive any portion of the $80.00 appraisal services fee that was paid by the Freemans to Title Source, Inc. *See* Freeman HUD-1 Settlement Statement, Ex. C.

11. The records of Quicken Loans reflect that on May 29, 2007, the Bennetts executed a promissory note ("Bennett Note") in the amount of $88,000.00 in favor of Quicken Loans secured by a mortgage ("Bennett Mortgage") encumbering property located at 706 Mire Street, Houma, Louisiana 70364 (the "Bennett Property") (collectively the "Bennett Loan"). *See* Bennett Note, attached hereto as Ex. G; Bennett Mortgage, attached hereto as Ex. H.

12. In connection with the Bennett Loan, the Bennetts paid a $1,100.00 loan discount fee and an $80.00 appraisal services fee. *See* Bennett HUD-1 Settlement Statement, attached hereto as Ex. I.

13. Both the loan discount fee and the appraisal services fee were disclosed to the Bennetts prior to and at the loan closing as evidenced by the

following documents: Bennett HUD-1 Settlement Statement, Ex. I; Bennett Good Faith Estimate, Ex. J; Bennett Application, Ex. K.

14. The payment of the $1,100.00 loan discount fee and the $80.00 appraisal services fee by the Bennetts was a condition of and a prerequisite to Quicken Loans' extension of credit to the Bennetts.

15. The $1,100.00 loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to the Bennetts.

16. The $1,100.00 loan discount fee paid by the Bennetts was paid to and retained solely by Quicken Loans. *See* Bennett HUD-1 Settlement Statement, Ex. I.

17. Quicken Loans did not receive any portion of the $80.00 appraisal services fee that was paid by the Bennetts to Title Source, Inc. *See* Bennett HUD-1 Settlement Statement, Ex. I.

18. A true and correct copy of the Freeman Note is attached hereto as Ex. A.

19. A true and correct copy of the Freeman Mortgage is attached hereto as Ex. B.

20. A true and correct copy of the Freeman HUD-1 Settlement Statement is attached hereto as Ex. C.

21. A true and correct copy of the Freeman Good Faith Estimate is attached hereto as Ex. D.

22. A true and correct copy of the Freeman Application is attached hereto as Ex. E.

23. A true and correct copy of the Freeman Interest Rate Disclosure is attached hereto as Ex. F.

24. A true and correct copy of the Bennett Note is attached hereto as Ex. G.

25. A true and correct copy of the Bennett Mortgage is attached hereto as Ex. H.

26. A true and correct copy of the Bennett HUD-1 Settlement Statement is attached hereto as Ex. I.

27. A true and correct copy of the Bennett Good Faith Estimate is attached hereto as Ex. J.

28. A true and correct copy of the Bennett Application is attached hereto as Ex. K.

/S/
Name: Michael Lyon
Title: Vice President of Operations, Quicken Loans

[Notary Certificate and Stamp Omitted]

Exhibits C And I To Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Freeman And Bennett Plaintiffs, Filed February 17, 2009

In Civil Action No. 2:08-cv-01626

[Exhibit C]

Settlement Statement Optional Form for Transactions without Sellers

U.S. Department of Housing and Urban Development

OMB Approval No. 2502-0491

Name & Address of Borrower:	Name & Address of Lender:
Tammy Foret Freeman Larry Scott Freeman 1425 Highway 55 Montegut, LA 70377	Quicken Loans Inc. (Lender) 20555 Victor Parkway Livonia, MI 48152
Property Location: (if different from above) 1425 Highway 55 Montegut, LA 70377	Settlement Agent Title Source, Inc. Place of Settlement: 1425 Highway 55, Montegut, LA 70377
Loan Number 3210733817	Settlement Date: 02/14/07 Disbursement Date: 02/20/07

L. Settlement Charges		1300. Additional Settlement Charges .	
800. Items Payable in Connection with Loan		1301. Survey to	0.00
801. Loan Origination fee __% to Quicken Loans	0.00	1302. Pest inspection to	0.00
802. Loan Discount Fee 1.000 % to: Quicken Loans Inc.	$980.00	1303. Sub. Agree. To	0.00
803. Appraisal Fee to: BRIAN W LA ROSE APPRAISAL	$300.00	1304. Tax related Service Fee	0.00
804. Credit Report to: Fiserv CredStar	$12.04	1305a. Document Preparation	0.00
805. Inspection fee to	0.00	1305b.	0.00
806. Wire Fee	0.00	1306.	0.00
807. Flood Life of Loan Coverage First American	$5.00	1307. Express Mail/Courier Fee	45.00

808. Flood Cert Fee.to: First American Flood	$10.50	1308. Debts to be paid (per addendum)	0.00
809. Underwriting Fee to Quicken Loans Inc.	$295.00	1309. Taxes Owed	0.00
810. Processing Fee to: Quicken Loans Inc.	$575.00	1310. Escrow Holdback	0.00
811. Buydown Fee	0.00	1311. VOD/VOM/VOR to:	0.00
812.		1400. Total Settlement Charges [illegible]	$3,244.69
813.			
814		M. Disbursements to Others	
888. TSI Appraisal Services	$80.00		
900. Items Required by Lender to be Paid In Advance		1501. CHRYSLER FINANCIAL	$27,790.00
901. Int. from 02/20/2007 to 03/01/2007 @ $17.35 per day for 9 days.	$156.15	1502. CAPITAL1 BK	$7,955.00
902. Mortgage Insurance Premium for months to		1503. BANK OF AMERICA VISA/MC	$4,963.00
903. Hazard Insurance premium for 1 year(s) to Allstate	$0.00	1504. CHASE	$4,690.00
904. Flood Insurance to Fidelity	$0.00	1505. CHASE	$4,685.00
905.		1506. CHASE/CC	$4,356.00
1000. Reserves Deposited with Lender		1507. UNVL/CITI	$4,075.00
1001. Hazard Insurance mos. @ $ per mo.		1508. TELERECOVERY (original credito	$1,836.00
1002. Mortgage Insurance mos. @ $ per mo.		1509. CAPITAL ONE, NA 115600221137	$19,025.00
1003. City Property taxes mos. @ $ per mo.		1520. TOTAL DISBURSED (enter on line 1603)	$79,375.00
1004. County Taxes mos. @ $ per mo.			
1005. Annual assessments mos. @ $ per mo.			
1006. mos. @ $ per mo.			
1007. mos. @ $ per mo.			

1008, Aggregate Acct. Adjustment most. @ $ per mo.	$0.00		
1100. Title Charges Title Commitment #02472920			
1101. Settlement or Closing Fee to: Title Source Inc- N	$325.00		
1102. Abstract or title search to Title source, Inc.	0.00		
1103. Title examination to Title Source, Inc.	0.00		
1104. Title insurance binder to Title Source, Inc.	0.00		
1105a. Doc Preparation to	0.00		
1105b. Deed Preparation to	0.00		
1106. Notary fees to	0.00		
1107. Attorneys' fees to (includes above item numbers)	0.00	N. NET SETTLEMENT	
1108. Title Insurance to: TITLE SOURCE, INC. (includes above item numbers)	$326.00	1600. Loan Amount	$98,000.00
1109. Lender's Coverage $98,000.00	0.00	1601. Plus Deposit Previously Received	$500.00 0.00
1110. Owner's coverage $	0.00	1602. Minus Total Settlement Charges(line 1400) * PDC - Not in Total	$3,244.69
1111. Additional Closing Fee	0.00		0.00
1112. (Misc) Title Charges to Title Source, Inc.	0.00	1603. Minus Total Disbursements to Others (line 1520)	$79,375.00
1113. Addl Endorsement Fee	0.00	1604. Equals Cash to Borrower (after expiration of any applicable rescission period required bylaw)	$15,880.31
1114.	0.00		
1200. Government Recording and Transfer Charges			

1201. Recording Fee	$135.00		
1202. City/county tax/stamps	0.00	Borrower(s) Signatures:	
1203. State tax/stamps	0.00		
1204. Assignment Fee	0.00		
1205. (Misc) Rec./Trans. Cost	0.00	/S/ Tammy Foret Freeman	
1206.	0.00		
1207.	0.00	/S/ Larry Scott Freeman	
1208.	0.00		

[Exhibit I]

Settlement Statement
Optional Form for Transactions without Sellers

U.S. Department of Housing and Urban Development

OMB Approval No. 2502-0491

Name & Address of Borrower: John J. Bennett, III, Stacey B. Bennett 706 Mire St Houma, LA 70364	Name & Address of Lender: Quicken Loans Inc. (Lender) 20555 Victor Parkway Livonia, MI 48152
Property Location: (if different from above) 706 Mire St Houma, LA 70364-1951	Settlement Agent Title Source, Inc. Place of Settlement: 706 Mire St, Houma, LA 70364
Loan Number 3212031706	Settlement Date: 05/29/07 Disbursement Date: 06/04/07 .

L. Settlement Charges		M. Disbursements to Others	
800. Items Payable in Connection with Loan		1501. CAPITAL ONE, NA	$78,922.45
802. Loan Discount Fee 1.250 % to: Quicken Loans Inc.	$1,100.00	1502. CITI	$937.00
803. Appraisal Fee to: BRIAN W LA ROSE APPRAISAL	$300.00	1503. GEMB/CLIMATE SELECT	$664.00
804. Credit Report to: Fiserv CredStar	$28.31	1504. SEARS/CBSD	$540.00
807. Flood Life of Loan Coverage to: First American Flood	$5.00	1505. GEMB/LOWES	$857.00
808. Flood Cert Fee.to: First American Flood Data Services	$10.50		
809. Underwriting Fee to: Quicken Loans Inc.	$395.00		
810. Processing Fee to: Quicken Loans Inc.	$675.00		
888. TSI Appraisal Services	$80.00		

900. Items Required by Lender to be Paid In Advance			
901. Int. from 06/04/2007 to 07/01/2007 @ $15.58 per day for 27days.	$420.66		
1000. Reserves Deposited with Lender			
1001. Hazard Insurance 2 months @ $102.43 per month	$204.86		
1004. County Taxes 9 months @ $ 00 per month			
1008, Aggregate Acct. Adjustment	$-0.05		
1100. Title Charges Title Commitment #02607298			
1101. Settlement or Closing Fee to: Title Source Inc-Notar	$325.00		
1108. Title Insurance to: TITLE SOURCE, INC.	$186.00		
1200. Government Recording and Transfer Charges			
1201b. Recording Mortgage Fee	$140.00		
1300. Additional Settlement Charges .			
1307. Express Mail/Courier Fee to:	$45.00		
1400. Total Settlement Charges			
(enter on line 1602)	$3,915.28		
		1520. TOTAL DISBURSED (enter on line 1603)	$81.920.45
		N. NET SETTLEMENT	
		1600. Loan Amount	$88,000.00

		1601. Plus Deposit Previously Received	$400.00
		1602. Minus Total Settlement Charges	$3,915.28
		(line 1400) POC - Not in Total	$0.00
		1603. Minus Total Disbursements to Others	$81,920.45
		(line 1520)	
		1604. Equals Cash to Borrower	$2,564.27
		(after expiration of any applicable	
		rescission period required bylaw)	

Borrower(s) Signatures:

	05/29/2007	/	05/29/2007
John J. Bennett, III	Date	Stacey B. Bennett	Date
/S/	5/29/07	/S/	5/29/07
	Date		Date

VMP-504 rhudl.pcl 2004/12
1489420185 05/25-19:03:48

form HUD-1A (2/94)
ref. RESPA

APPENDIX J

Freeman And Bennett Plaintiffs' Response To Defendants' Statement Of Uncontested Material Facts, Dated March 24, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

FREEMAN AND BENNETT PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS

NOW COMES the Plaintiffs, Tammy and Larry Freeman (the "Freemans"), and John and Stacey Bennett (the "Bennetts"), and solely for purposes of their memorandum in support of Plaintiffs' opposition to Defendants' motion for summary judgment, respond to Defendants' Statement of Uncontested Material Facts as follows:

1. Plaintiffs do not dispute the facts alleged in paragraph 1.

2. Plaintiffs do not dispute the facts alleged in paragraph 2.

3. Plaintiffs dispute the alleged facts in paragraph 3, in that the loan discount fees were paid to lower their interest rates, but such a service was not provided, and that the appraisal services fees were paid, but no, nominal and/or duplicative work was provided. *See* Exs. 7, 8, 18, 21, 22, 30 and 32.

4. Plaintiffs dispute the alleged facts in paragraph 4, as some of their loan documents reference a "premium," which may refer to a portion of the discount fees that may have been split and/or

paid to another person or entity. *See* Exs. 18, 22 and 32. Plaintiffs request additional time for discovery to investigate this claim.

5. Plaintiffs do not dispute the facts alleged in paragraph 5.

6. Plaintiffs dispute the alleged facts in paragraph 6, in that Quicken and Title Source are affiliated entities which are owned by the same parent company, and disclosures provided to Plaintiffs suggest that Quicken may benefit from the referral and fees paid by the Plaintiffs due to the affiliation. *See* Exs. 10-11.

7. Plaintiffs dispute the facts alleged in paragraph 7, in that Quicken and TSI Appraisal are one in the same, and the $80 fee was charged for no, nominal or duplicative work performed. *See* Exs. 10-11.

8. Plaintiffs dispute the facts alleged in paragraph 8, in that Quicken and TSI Appraisal are one in the same, and any contract entered into by Quicken with the Plaintiffs, also applied to Title Source for purposes of these loan transactions. *See* Exs. 10-11.

9. Plaintiffs do not dispute the facts alleged in paragraph 9.

10. Plaintiffs do not dispute the facts alleged in paragraph 10.

11. Plaintiffs dispute the alleged facts in paragraph 11, in that the loan discount fees were paid to lower their interest rates, but such a service

was not provided, and that the appraisal services fees were paid, but no, nominal and/or duplicative work was performed. *See* Exs. 7, 8, 18, 21, 22, 30 and 32.

12. Plaintiffs dispute the alleged material facts in paragraph 12, as upon information and belief, their loans were immediately transferred to another entity after closing, and Plaintiffs aver that a portion of the loan discount fee may have been paid to the transferee company. *See* Exs. 18, 22, 32 and 38. Plaintiffs request additional time for discovery to investigate this claim.

13. Plaintiffs do not dispute the facts alleged in paragraph 13.

14. Plaintiffs dispute the facts alleged in paragraph 14, in that Quicken and Title Source are affiliated entities which are owned by the same parent company, and disclosures provided to Plaintiffs suggest that Quicken may benefit from the referral and from fees paid by the Plaintiffs due to the affiliation. *See* Exs. 10-11.

15. Plaintiffs dispute the facts alleged in paragraph 15, in that Quicken and TSI Appraisal are one in the same, and the $80 fee was charged for no, nominal or duplicative work performed. *See* Exs. 10-21.

16. Plaintiffs dispute the material facts alleged in paragraph 16, in that Quicken and TSI Appraisal are one in the same, and any contract entered into by Quicken with the Plaintiffs, also

applied to Title Source for purposes of these loan transactions. *See* Exs. 10-11.

RESPECTFULLY SUBMITTED,

[Attorneys for Plaintiffs]

[Signatures and Certificates of Service Omitted]

APPENDIX K

Petition For Damages By Paul Smith And Irma Smith, Originally Filed March 25, 2008, Removed April 11, 2008, Consolidated August 7, 2008

In Civil Action No. 2:08-cv-01626 (consolidated from Civil Action No. 2:08-cv-01627)

[Caption Omitted]

PETITION FOR DAMAGES

The petition of Paul Smith and Irma Smith, residents of Terrebonne Parish, State of Louisiana, with respect represents:

1.

Made defendant herein is QUICKEN LOANS, INC., (hereinafter referred to as "Quicken Loans"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered agent for the service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808.

2.

Made defendant herein is TITLE SOURCE, INC., (hereinafter referred to as "Title Source"), a foreign corporation authorized to do and doing business in the State of Louisiana, whose registered agent for the service of process is: C.T. Corporation Systems, 5615 Corporate Blvd., Suite 400B, Baton Rouge, LA 70808. Upon information and belief, Title Source does business under the assumed name of "TSI Appraisal Services."

3.

This Court has jurisdiction over this action and venue is proper because the property upon which the mortgage loan was placed is located in this judicial district, and the illegal charges were incurred in this judicial district. Plaintiffs suffered the damages alleged herein in Terrebonne Parish. The Plaintiffs stipulate that the amount in controversy does not exceed Seventy-Five Thousand ($75,000.00) Dollars, exclusive of interest and costs.

4.

On March 16, 2007, Paul Smith and Irma Smith entered into a mortgage transaction with Quicken Loans, Inc. The loan was obtained in a consumer credit transaction and was primarily for personal, family or household purposes, and the mortgage was secured by the Plaintiffs' dwelling. The note and mortgage that the Plaintiffs entered into with Quicken Loans created a "federally related mortgage loan" as defined at 12 U.S.C. § 2602(1).

5.

Quicken Loans charged the Plaintiffs, as indicated on the HUD-1 statement, a loan origination fee of $5,107.44 — an amount equal to 2.875% of their loan amount of $177,650.00. In addition to the loan origination fee, Quicken Loans also charges the Smiths a processing fee of $575.00. According to Quicken Loans' website, a loan origination fee is a "fee charged by a lender to cover administrative costs of processing a loan." According to Quicken Loans' website, a processing fee "covers

the lender's cost to process the information on your loan application."

6.

Plaintiffs also show that they were charged $300 for an appraisal by a local real estate appraiser, and an additional $80 fee with only a reference to "TSI Appraisal Services" on the HUD-1 statement.

7.

Plaintiffs claims arise, in part, under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.*, in connection with Quicken Loans' imposition of a loan origination fee for which no, nominal or duplicative service was provided and/or that is in excess of the reasonable value of goods or facilities provided for the services actually performed by Quicken Loans, Inc.

8.

Plaintiffs' claims further arise, in part, under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.*, in connection with Quicken Loans' imposition of a loan processing fee for which no, nominal or duplicative service was provided and/or the loan processing fee was in excess of the reasonable value of goods or facilities provided for the services actually performed by Quicken Loans, Inc.

9.

Plaintiffs' claims further arise, in part, under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.*, in connection with

fees charged by Title Source d/b/a TSI Appraisal Services in that the fee was split and/or TSI Appraisal Services provided no, nominal, or duplicative work in connection with the Plaintiffs' loan for the $80 fee incurred and/or the $80 fee was in excess of the reasonable value of goods or facilities provided for the services actually performed by Title Source, all in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601, *et seq.*

10.

RESPA requires the lender to provide the borrower a settlement statement which shall "conspicuously and clearly itemize all charges imposed upon the borrower...in connection with the settlement." 12 U.S.C. § 2603(a).

11.

Plaintiffs aver that Quicken Loans disguised unearned fees by calling them loan origination fees on the Plaintiffs HUD-1. Although the Plaintiffs HUD-1 showed an amount on line 801 as loan origination fees, Plaintiffs allege that they are in actuality, bogus charges and/or fees, the purpose of which was to increase unearned compensation for Quicken Loans. Additionally, Plaintiffs allege that the loan origination fees exceed the percentages allowed by HUD rules and regulations.

12.

RESPA prohibits unearned fees: "No person shall give and no person shall accept any portion, split, or percentage of any charge, made of received for the rendering of a real estate settlement service

in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

13.

A consumer reviewing his or her HUD-1 without the benefit of a Quicken Loan price list and rate sheet would be unable to determine that he or she had been overcharged for loan origination fees or the true purpose of the unearned fees.

14.

Plaintiffs exercised reasonable diligence during their loan transaction and dealings with Quicken Loans and in reviewing their loan documentation, they could not have, nor been reasonably expected to, uncover the true facts.

15.

Plaintiffs were entitled to have their federally related mortgage transaction closed without charges being imposed for services not performed, and without charges in excess of the amount allowed by RESPA.

16.

Plaintiffs aver that the Defendants' lending scheme, as described above, violates RESPA at 12 U.S.C. § 2607.

17.

Plaintiffs aver that the section 801 (loan origination fee) and 813 (processing fee) and (814) (TSI Appraisal Services) charges listed on their

HUD-1 were imposed for services that were not bona fide, not rendered, not paid or were for nominal, unreasonable or duplicative services for which no fees were earned and for which no fees should have been imposed, all in violation of RESPA at 12 U.S.C. § 2607, and RESPA's implementing regulations, Regulation X, at 24 C.F.R. § 3500.14.

18.

As a result of the RESPA violations alleged above, the Plaintiffs have been damaged in an amount to be determined at a trial of this action, where they will seek all permissible damages, including, but not limited to, compensatory damages, treble damages, costs, interest and reasonable attorneys' fees.

19.

Plaintiffs further show that the parties entered into a mortgage and loan contract.

20.

Plaintiffs aver that the Defendants have breached the contract(s) they entered into with the Plaintiffs by charging and collecting unearned loan origination fees, processing fees and appraisal fees. The Plaintiffs show that they have been damaged as a result of the breach of contract(s) and they are entitled to damages as a result of the breach(es) as provided by law.

21.

Plaintiffs aver that they have paid a thing or debt not owed to the Defendants in the form of

unearned loan origination fees, processing fees and appraisal fees, and therefore, the Defendants are obligated to return those unearned fees to the Plaintiffs.

22.

Plaintiffs avers that the Defendants have been unjustly enriched in the charging and collecting of unearned loan origination fees, processing fees and appraisal fees from the Plaintiffs, and therefore, the Defendants are obligated to return the unearned fees to the Plaintiffs.

WHEREFORE, Plaintiffs pray that Defendants Quicken Loans, Inc., and Title Source, Inc., be served with a copy of this petition and cited to appear and answer same, and, that after all due proceedings had, there be a judgment herein in favor of the Plaintiffs and awarding the Plaintiffs all compensatory, statutory and treble damages provided under applicable law, as well as for all costs of this suit and for legal interest, including attorneys' fees, if applicable, and all just and equitable relief.

BY ATTORNEYS:

[Attorneys for Plaintiffs]

[Signatures and Certificates of Service Omitted]

APPENDIX L

Quicken Loans, Inc.'s Answer And Affirmative Defenses To The Smith Plaintiffs' Petition For Damages, Dated April 11, 2008

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

QUICKEN LOANS, INC.'S ANSWER AND AFFIRMATIVE DEFENSES TO THE PLAINTIFFS' PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes Quicken Loans, Inc. ("Quicken Loans"), who submits its answers and defenses to the Petition for Damages ("Petition") filed by the plaintiffs, Paul Smith and Irma Smith ("Plaintiffs"), in the above-captioned matter. Quicken Loans, with full reservation of its defenses, and with respect, represents as follows:

FIRST AFFIRMATIVE DEFENSE

The Petition fails to state a claim or cause of action against Quicken Loans upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

AND NOW, for answer to the separate allegations contained in Plaintiffs' Petition, Quicken Loans avers as follows:

INTRODUCTORY PARAGRAPH

In response to the first un-numbered Introductory Paragraph of the Petition, Quicken

Loans denies that Plaintiffs are residents of Terrebonne Parish, State of Louisiana, for lack of information sufficient to justify a belief therein.

I.

Quicken Loans admits the allegations contained in Paragraph 1 of the Petition.

II.

The allegations contained in Paragraph 2 of the Petition are not direct to and require no response from Quicken Loans. To the extent that a response may be required, Quicken Loans denies said allegations for lack of information sufficient to justify a belief therein.

III.

The allegations contained in Paragraph 3 of the Petition concerning jurisdiction, venue, illegal charges, and damages state legal conclusions to which no response is required. Quicken Loans specifically denies that there were any illegal charges collected in connection with the Plaintiffs' mortgage loan and that any damages were suffered by the Plaintiffs. In the alternative, if the Plaintiffs sustained any damages, which is specifically denied, Quicken Loans admits that the amount in controversy does not exceed $75,000, as so stipulated by the Plaintiffs.

IV.

In response to the allegations contained in Paragraph 4 of the Petition, Quicken Loans admits that the Plaintiffs executed a promissory note and

mortgage in favor of Quicken Loans on March 16, 2007. The remaining allegations contained in Paragraph 4 of the Petition state legal conclusions and include terms with specific legal meaning to which no response is required. To the extent that a response may be required, Quicken Loans submits that the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, is the best evidence of its terms, and Quicken Loans denies all allegations that conflict with RESPA. Quicken Loans further denies all allegations of fact contained in Paragraph 4 of the Petition.

V.

In response to the allegations contained in Paragraph 5 of the Petition, Quicken Loans admits that the HUD-1 Settlement Statement is the best evidence of its terms. Quicken Loans, however, denies that it charged the Plaintiffs a $5,107.44 origination fee; in fact, Quicken Loans charged, and the Plaintiffs agreed to pay, a $5,701.44 loan discount fee. In response to the allegations concerning its website, Quicken Loans submits that the website is the best evidence of its content, and Quicken Loans denies all allegations that are inconsistent therewith.

VI.

In response to the allegations contained in Paragraph 6 of the Petition, Quicken Loans admits that the HUD-1 Settlement Statement accurately reflects settlement service charges payable to Brian W. LaRose in the amount of $300.00 and to TSI Appraisal Services in the amount of $80.00. Quicken

Loans denies the remaining allegations contained in Paragraph 6 of the Petition.

VII.

The allegations contained in Paragraph 7 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans also specifically denies that it violated RESPA and specifically denies all allegations of fact contained in Paragraph 7 of the Petition.

VIII.

The allegations contained in Paragraph 8 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans also specifically denies that it violated RESPA and specifically denies all allegations of fact contained in Paragraph 8 of the Petition.

IX.

The allegations contained in Paragraph 9 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent

therewith. Quicken Loans also specifically denies that it violated RESPA and specifically denies all allegations of fact contained in Paragraph 9 of the Petition.

X.

The allegations contained in Paragraph 10 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith.

XI.

Quicken Loans denies the allegations contained in Paragraph 11 of the Petition.

XII.

The allegations contained in Paragraph 12 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith.

XIII.

Quicken Loans denies the allegations contained in Paragraph 13 of the Petition.

XIV.

Quicken Loans denies the allegations contained in Paragraph 14 of the Petition.

XV.

The allegations contained in Paragraph 15 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 15 of the Petition.

XVI.

The allegations contained in Paragraph 16 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 16 of the Petition.

XVII.

The allegations contained in Paragraph 17 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 17 of the Petition.

XVIII.

The allegations contained in Paragraph 18 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans submits that RESPA is the best evidence of its terms, and Quicken Loans denies all allegations that are inconsistent therewith. Quicken Loans further denies all allegations of fact contained in Paragraph 18 of the Petition.

XIX.

In response to the allegations contained in Paragraph 19 of the Petition, Quicken Loans admits that the Plaintiffs executed a promissory note and mortgage on March 16, 2007 in favor of Quicken Loans. Quicken Loans denies that co-defendant Title Source was a party to either the afore-described promissory note or mortgage.

XX.

The allegations contained in Paragraph 20 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 20 of the Petition.

XXI.

The allegations contained in Paragraph 21 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the

allegations contained in Paragraph 21 of the Petition.

XXII.

The allegations contained in Paragraph 22 of the Petition state legal conclusions to which no response is required. To the extent that a response may be required, Quicken Loans denies the allegations contained in Paragraph 22 of the Petition.

XXIII.

Quicken Loans denies the allegations contained in the unnumbered Paragraph of the Petition entitled beginning with "WHEREFORE," and all subparts thereto.

THIRD AFFIRMATIVE DEFENSE

Quicken Loans denies all allegations in the Petition that were not heretofore admitted.

FOURTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the applicable statute of limitations, prescriptive and peremptive periods, and/or laches as is evident on the face of the Petition.

FIFTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the doctrines of accord and satisfaction.

SIXTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the doctrines of waiver, ratification, unclean hands and/or estoppel.

SEVENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are subject to any rights or setoff and/or recoupment that Quicken Loans may have.

EIGHTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs are barred by the statute of frauds and/or the parol evidence rule.

NINTH AFFIRMATIVE DEFENSE

At all relevant times, Quicken Loans acted in accordance with any and all of its obligations to the Plaintiffs, and the laws of the State of Louisiana and of the United States of America.

TENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with all applicable contracts, laws and regulations.

ELEVENTH AFFIRMATIVE DEFENSE

Quicken Loans is not liable for any of the claims in the Petition because Quicken Loans' conduct and disclosures at all times complied, and were in good faith conformity, with RESPA.

TWELFTH AFFIRMATIVE DEFENSE

The Plaintiffs' claims against Quicken Loans are improperly brought under RESPA and should be dismissed accordingly.

THIRTEENTH AFFIRMATIVE DEFENSE

Quicken Loans did not give or accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with the Plaintiff's mortgage loan other than for services actually performed.

FOURTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs have not sustained any damages proximately caused by Quicken Loans.

FIFTEENTH AFFIRMATIVE DEFENSE

Some or all of the Plaintiffs' state law claims (to the extent that any have been properly alleged, which is denied) may be preempted.

SIXTEENTH AFFIRMATIVE DEFENSE

Any damages sustained by the Plaintiffs (the existence of which damages is denied) were the result of acts or omissions of persons other than Quicken Loans, for which Quicken Loans is not legally responsible.

SEVENTEENTH AFFIRMATIVE DEFENSE

The Plaintiffs have failed to mitigate any damages they incurred (the existence of which damages is denied).

EIGHTEENTH AFFIRMATIVE DEFENSE

The claims asserted by the Plaintiffs should be dismissed, or alternatively, their damages (which purported claims and damages are hereby expressly denied) should be reduced due to Plaintiffs' own negligent and/or wrongful conduct and/or own breach of contract, and/or conduct of third parties.

NINETEENTH AFFIRMATIVE DEFENSE

The rights, obligations and duties of Quicken Loans to the Plaintiffs are exclusively defined by contract.

TWENTIETH AFFIRMATIVE DEFENSE

The terms, conditions, and provisions of the documents memorializing the Plaintiffs' alleged agreement(s) with Quicken Loans are specifically and affirmatively pled herein, as if set forth herein in full, which terms, conditions and provisions act to bar and/or limit the claims of the Plaintiffs.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The Plaintiffs have failed to plead fraud with specificity, as needed to establish equitable tolling, as required by Rule 9 of the Federal Rules of Civil Procedure.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Quicken Loans did not conceal any fact regarding the fees collected in connection with the Plaintiffs' March 16, 2007 promissory note and mortgage.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Quicken Loans reserves the right to assert any additional affirmative defenses that may be discovered during the course of additional investigation and discovery.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Quicken Loans further answers by asserting the responses raised in this Answer as defenses.

WHEREFORE, Quicken Loans, Inc. respectfully prays that this Answer and Affirmative Defenses be deemed good and sufficient and that after due proceedings are had, there be judgment herein in its favor, dismissing the Petition for Damages filed by Plaintiffs, Paul Smith and Irma Smith, with prejudice, at Plaintiffs' costs, granting Quicken Loans its attorneys' fees, and all such relief to which Quicken Loans is entitled.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX M

Quicken Loans, Inc.'s Motion For Summary Judgment Against The Smith Plaintiffs, Dated February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come defendants Quicken Loans Inc. ("Quicken Loans") and Title Source, Inc. ("Title Source"), who respectfully move the Court to grant their Motion for Summary Judgment, and to dismiss, with prejudice, all claims asserted by the plaintiffs, Paul Smith and Irma Smith (the "Smiths" or "Plaintiffs"), in the above-captioned matter, based on the following grounds:

I.

The Smiths allege that that Quicken Loans and Title Source violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"), breached their loan contracts, received payments that were not owed and were unjustly enriched by accepting a loan discount fee, a loan processing fee and an appraisal services fee. Despite Plaintiffs' allegations, each of these claims fail as a matter of law.

II.

The undisputed material facts establish that there was no split of the loan discount fee, loan processing fee or the appraisal services fee, as is

required to establish a claim under Section 8(b) of RESPA. Accordingly, Plaintiffs' RESPA claim fails as a matter of law.

III.

The undisputed material facts also establish that there was no contract, oral or written, between Plaintiffs and Title Source. In addition, there is no provision of the loan contracts between Plaintiffs and Quicken Loans that could have been breached. Accordingly, Plaintiffs' breach of contract claims against Title Source and Quicken Loans fail as a matter of law.

IV.

Further, the loan discount fee, loan processing fee and appraisal services fee were conditions of and prerequisites to the extension of credit agreed to and enjoyed by Plaintiffs. Therefore, each fee was "owed," making the "enrichment" with "cause." Moreover, the Louisiana Credit Agreement Statute bars each of the Plaintiffs' claims that are not based on a written agreement, signed by the parties, expressing consideration and setting forth the terms of the agreement. Consequently, Plaintiffs' payment of a thing not owed and unjust enrichment claims fail as a matter of law.

V.

The reasons in support of this Motion for Summary Judgment are more fully set forth in the supporting memorandum attached hereto, and incorporated herein by reference.

WHEREFORE, Quicken Loans Inc. and Title Source, Inc. respectfully request that the Court grant their Motion for Summary Judgment, and dismiss, with prejudice, all claims asserted by the Smiths against Quicken Loans Inc. and Title Source, Inc. in this case.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX N

Quicken Loans, Inc.'s Statement Of Uncontested Material Facts In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs, Dated February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

STATEMENT OF UNCONTESTED MATERIAL FACTS

Pursuant to Rule 56, Quicken Loans Inc. ("Quicken Loans") and Title Source, Inc. ("Title Source"), respectfully submit the following statement of uncontested material facts in support of their motion for summary judgment.

1. On March 16, 2007, Paul Smith and Irma Smith (the "Smiths" or "Plaintiffs") executed a promissory note ("Note") in the amount of $177,650.00 in favor of Quicken Loans secured by a mortgage ("Mortgage") on property located at 3751 Grand Caillou Road, Houma, Louisiana 70363 ("Property"). *See* Affidavit of Michael Lyon, Vice President of Operations, Quicken Loans, Ex. 1, at ¶ ¶ 4; Note, attached to Ex. 1 as Ex. A ("Ex. 1-A"); Mortgage, attached to Ex. 1 as Ex. B ("Ex. 1-B").

2. In connection with the loan closing, the Smiths paid a $5,107.44 loan discount fee, a $575.00 loan processing fee, and an $80.00 appraisal services fee. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 5.

3. The payment of the $5,107.44 loan discount fee, $575.00 loan processing fee, and $80.00

appraisal services fee by the Smiths was a condition of and a prerequisite to Quicken Loans' extension of credit to the Smiths. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 8.

4. Although the HUD-1 Settlement Statement lists the $5,107.44 fee as a loan origination fee, this fee was, in fact, a loan discount fee. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 6.

5. The disclosures provided to Plaintiffs prior to the loan closing and the Closing Instructions to the closing agent, Craig Landry, Esq., establish that the $5,107.44 fee was a loan discount fee. *See* Application, Ex. 1-C; Good Faith Estimate, Ex. 1-D; and Closing Instructions, attached to Ex. 1 as Ex. F ("Ex. 1-F").

6. The $5,107.44 loan discount fee was paid to and retained solely by Quicken Loans. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 9; HUD-1 Settlement Statement, Ex. 1-E.

7. The loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to Plaintiffs. Affidavit of Michael Lyons, Ex. 1, at ¶ 11.

8. The $575.00 loan processing fee was also paid to and retained solely by Quicken Loans. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 9; HUD-1 Settlement Statement, Ex. 1-E.

9. The loan processing fee covers the cost of compiling and packaging the supporting documentation necessary to close the Plaintiffs' lon. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 10.

10. The $80.00 appraisal services fee was paid to and completely retained by Title Source. *See* Affidavit of Michael Lyons, Ex. 1, at ¶ 12; Affidavit of Jeffery K. Eisenshtadt, President of Title Source, Ex. 2, at ¶ 9.

11. The appraisal services fee represents work performed by TSI Appraisal in locating and contacting qualified appraisers, scheduling appointments with the appraiser, reviewing the appraisal report, contacting the appraiser regarding any deficiencies in the report or additional required information, paying the appraiser and otherwise processing the contents of the appraisal for Quicken Loans purposes. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 7.

12. There is no written or oral contract between Title Source and Plaintiffs. *See* Affidavit of Jeffery K. Eisenshtadt, Ex. 2, at ¶ 5.

Respectfully Submitted,

[Attorneys for Defendant]

[Signatures and Certificates of Service Omitted]

APPENDIX O

Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs, Filed February 17, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

AFFIDAVIT OF MICHAEL LYON

STATE OF MICHIGAN
COUNTY OF OAKLAND

PERSONALLY APPEARED before me, the undersigned notary in and for the jurisdiction aforesaid,

MICHAEL LYON

Who, after being duly sworn, states under oath:

1. My name is Michael Lyon. I am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am employed by Quicken Loans and hold the position of Vice President of Operations.

3. I have made an examination of the records of Quicken Loans Inc. ("Quicken Loans") pertaining to the mortgage account of plaintiffs, Paul Smith and Irma Smith (the "Smiths"). These records were made at or near the time of the events described therein by and from information transmitted by persons with knowledge of the events described therein who were routinely acting for Quicken Loans in recording the information

described therein. These records were kept in the course of Quicken Loans' regularly conducted business activities, and it was the regular practice of Quicken Loans' business activities to make and keep these records.

4. The records of Quicken Loans reflect that on March 16, 2007, the Smiths executed a promissory note ("Smith Note") in the amount of $177,650.00 in favor of Quicken Loans secured by a mortgage ("Smith Mortgage") on property located at 3751 Grand Caillou Road, Houma, Louisiana 70363 ("Smith Property"). *See* Smith Note, attached hereto as Ex. A; Smith Mortgage, attached hereto as Ex. B.

5. In connection with the Smith loan, the Smiths paid a $5,107.44 loan discount fee, a $575.00 loan processing fee, and an $80.00 appraisal services fee. *See* Application, attached hereto as Ex. C; Good Faith Estimate, attached hereto as Ex. D; HUD-1 Settlement Statement, attached hereto as Ex. E.

6. Although the HUD-1 Settlement Statement lists the $5,107.44 fee as a loan origination fee, this fee was, in fact, a loan discount fee, as evidenced by the disclosures provided to the Smiths prior to the loan closing, and as indicated on the Closing Instructions to the closing agent, Craig Landry, Esq. *See* Application, Ex. C; Good Faith Estimate, Ex. D, and Closing Instructions, attached hereto as Ex. F.

7. The loan discount fee, loan processing fee and the appraisal services fee were each disclosed to the Smiths prior to and at the loan closing as evidenced by the following documents: Application,

Ex. C; Good Faith Estimate, Ex. D; HUD-1 Settlement Statement, Ex. E.

8. The payment of the $5,107.44 loan discount fee, $575.00 loan processing fee, and $80.00 appraisal services fee by the Smiths was a condition of and a prerequisite to Quicken Loans' extension of credit to the Smiths.

9. The $5,107.44 loan discount fee and $575.00 loan processing fee paid by the Smiths were paid to and retained solely by Quicken Loans. *See* Smith HUD-1 Settlement Statement, Ex. E.

10. The $575.00 loan processing fee covers the cost of compiling and packaging the supporting documentation necessary to close the Plaintiffs' loan.

11. The $5,107.44 loan discount fee was a component of the pricing of the loan terms offered by Quicken Loans to Plaintiffs.

12. Quicken Loans did not receive any portion of the $80.00 appraisal services fee that was paid by the Smiths to Title Source, Inc. *See* Smith HUD-1 Settlement Statement, Ex. E.

13. A true and correct copy of the Smith Note is attached hereto as Ex. A.

14. A true and correct copy of the Smith Mortgage is attached hereto as Ex. B.

15. A true and correct copy of the Application is attached hereto as Ex. C.

16. A true and correct copy of the Good Faith Estimate is attached hereto as Ex. D.

17. A true and correct copy of the HUD-1 Settlement Statement is attached hereto as Ex. E.

18. A true and correct copy of the Closing Instructions is attached hereto as Ex. F.

/S/

Name: Michael Lyon
Title: Vice President of Operations, Quicken Loans

[Notary Certificate and Stamp Omitted]

Exhibit E To Affidavit Of Michael Lyon In Support Of The Motion For Summary Judgment Against The Smith Plaintiffs, Filed February 17, 2009

In Civil Action No. 2:08-cv-01626

[Exhibit E]

A. SETTLEMENT STATEMENT
U.S. Department of Housing
and Urban Development

B. Type of Loan			
1. ☐FHA 2. ☒RHS 3. ☐Conv. Unins 4. ☐VA 5. ☐Conv. Unins	6. File Number 10866-07	7. Loan Number 32104080007	8. Mortgage Insurance Case Number

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name and Address of Borrower	E. Name and Address of Seller	F. Name and Address of Lender
PAUL RAY SMITH IRMA SMITH 3751 GRAND CAILLOU ROAD HOUMA, LOUISIANA, 70363	GLEN STEPHEN AUTHEMENT JOYCELYN LUKE AUTHEMENT	QUICKEN LOANS, INC. 20555 VICTOR PARKWAY LIVONIA, MI, 48152

G. Property Location	H. Settlement Agent	
3751 GRAND CAILLOU ROAD HOUMA, LOUISIANA, 70363 LOT 8, BLOCK 1, ASHLAND COMM-PLACE (PARK)	CRAIG J. LANDRY, ATTORNEY AT LAW	
	Place of Settlement 7825 Park Avenue HOUMA, LOUISIANA, 70364	I. Settlement Date 03/16/07 DD: 03/16/07

J. Summary of Borrower's Transaction:		K. Summary of Seller's Transaction:	
100. Gross Amount Due From Borrower		400. Gross Amount Due to Seller	
101. Contract sales price	187,000.00	401. Contract sales price	187,000.00

102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	16,206.18	403.	
104.		404.	
105.		405.	
Adjustment for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due from Borrower	203,206.18	420. Gross Amount Due to Seller	187,000.00
200. Amounts Paid by or in Behalf of Borrower		500. Reductions in Amount Due to Seller	
201. Deposit or earnest money	1,000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	177,650.00	502. Settlement charges to seller (line 1400)	8,365.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	94,748.13
		FIRST HORIZON	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 01/01 to 03/16	119.75	511. County taxes 01/01 to 03/16	119.75
212. Assessments to		512. Assessments to	

213.		513.	
214.		514.	
215.		515.	
216. APPLICATION DEPOSIT	550.00	516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid by/for Borrower	179,319.75	520. Total Reduction Amount Due Seller	103,232.88
300. Cash at Settlement from or to Borrower		600. Cash at Settlement to or from Seller	
301. Gross amount due from borrower (line 120)	203,206.18	601. Gross amount due to seller (line 420)	187,000.00
302. Less amounts paid by/for borrower (line 220)	179,319.75	602. Less reductions in amount due seller (line 520)	103,232.88
303. Cash From Borrower	23,886.43	603. Cash To Seller	83,767.12

SUBSTITUTE FROM 1099 SELLER STATEMENT The information contained herein is important tax information and is being furnished to the Internal Revenue Services. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that is has not been reported. The Contract Sales Price described on Line 401 above constitutes the Gross Proceeds of this transaction.

SELLER INSTRUCTIONS To determine if you have to report the sale or exchange of your primary residence on your tax return, see the Schedule D (Form 1040) instructions. If the real estate was not your primary residence, complete the applicable parts of Form 4797, Form 6252, and/or Schedule D (Form 1040)

You are required by law to provide the settlement agent with your correct taxpayer identification number. If you do not provide your correct taxpayer identification number you may be subject to civil or criminal penalties imposed by law. Under penalties of perjury, I certify that the number shown on this statement is my correct taxpayer identification number.

_____ TIN#	/S/ _____ GLEN STEPHEN AUTHEMENT
03-15-2007 at 1:03 PM	RESPA, HB 4305.2 – REV. HUD1 (3/86)

L. Settlement Charges:	File Number: 10866-07	Paid From Borrower's Funds At Settlement	Paid From Seller's Funds At Settlement
700. Total Sales/Broker's Commission based on price $ 187,000@ 4.00%= 7,480.00			
Division of Commission (line 700) as follows:			
701. $3,740.00 to LaRussa Real Estate Agency Inc			
702. $3,740.00 to FOUR STAR REAL ESTATE			
703. Commission paid at settlement			7,480.00
704.			
800. Items Payable in Connection with Loan		P.O.C	
801. Loan origination fee 2.875% QUICKEN LOANS, INC.		5,107.44	
802. Loan discount %			
803. Appraisal fee to	Brian La Rose	300.00	
804. Credit report to	CREDCO	7.51	
805. Lender's inspection fee to			
806. Mtg. Ins. application fee to			
807. Assumption fee to			
808. UNDERWRITING FEE	QUICKEN LOANS, INC.	295.00	
809. TAX SERVICE FEE			
810. FLOOD LIFE OF LOAN FLOOD DATA	FIRST AMERICAN	10.50	
811. DOCUMENT FEE			
812. FLOOD CERTIFICATE FLOOD DATA SERV.	1ST AMERICAN	5.00	
813. PROCESSING FEE	QUICKEN LOANS, INC.	575.00	
814. TSI APPRAISAL SERVICES SERVICES	TSI APPRAISAL	80.00	
815.			
900. Items Required by Lender to be Paid in Advance			

901. Interest from 03/16/07 to 04/01/07 @$ 38.24 /day 16 day(s)	611.84	
902. Mortgage insurance premium to		months to
903. Hazard insurance premium 1 years to LOUISIANA CITIZENS	5,771.00	
904. FLOOD INSURANCE ALLSTATE INSURANCE 317.00B		
905.		
1000. Reserves Deposited with Lender for		
1001. Hazard insurance 3 months @$ 480.92 /mo.	1,442.76	
1002. Mortgage insurance months @$ /mo.		
1003. City property taxes months @$ /mo.		
1004. County property taxes 7 months @$ 48.56 /mo.	339.92	
1005. Annual assessments months @$ /mo.		
1006. FLOOD INS. 3 months @$ 26.42 /mo.	79.26	
1007. months @$ /mo.		
1008. Aggregate Credit for Hazard/Flood Ins. City/County Prop Taxes, Mortgage Ins & Annual Assessments	-194.30	
1100. Title Charges		
1101. Settlement or closing fee to		
1102. Abstract or title search to CRAIG J. LANDRY, ATTORNEY AT LAW	490.00	
1103. Title examination to		
1104. Title insurance binder to		
1105. Document preparation to		
1106. Notary fees to		
1107. Attorney's fees to		
(includes above items numbers: 1101, 1102, 1103, 1105, 1106)		
1108. Title insurance to Commonwealth Land Title Insurance	835.25	
(includes above items numbers:)		
1109. Lender's coverage $177,650.00 – 596.50		
1110. Owner's coverage $187,000.00 – 238.75		
1111. Closing Protection Coverage Commonwealth Land Title Insurance	25.00	
1112. CANCELLATION SERVICES CRAIG J. LANDRY, ATTORNEY AT LAW		75.00
1113. RECORDING SERVICES CRAIG J. LANDRY, ATTORNEY AT LAW	275.00	
1200. Government Recording and Transfer Charges		
1201. Recording fees Deed $; Mortgage $; Releases $		
1202. City/county tax/stamps Deed $; Mortgage $		
1203. State tax/stamps Deed $; Mortgage $		
1204. AFFIDAVIT OF IDENTITY	45.00	

1205. MORTGAGE CANCELLATION FEE		
1300. Additional Settlement Charges		
1301. Survey to		
1302. Pest inspection to ROGERS PEST CONTROL		460.00
1303. COURIER FEES CRAIG J. LANDRY, ATTORNEY AT LAW	35.00	
1304.		
1305. WIRE SERVICES CRAIG J. LANDRY, ATTORNEY AT LAW	15.00	
1306. DIGITAL ARCHIVE TO GULF SOUTH CRAIG J. LANDRY, ATTORNEY AT LAW	20.00	
1307. DOWNLOAD SERVICES CRAIG J. LANDRY, ATTORNEY AT LAW	35.00	
1308. HOME WARRANTY U.A. DURR		350.00
1400. Total Settlement Charges (enter on lines 103, and 502, Section J and K)	16,206.18	8,365.00

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

/S/ PAUL RAY SMITH	/S/ IRMA SMITH	/S GLEN STEPHEN AUTHEMENT	/S/ JOYCELYN LUKE AUTHEMENT

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

/S/ CRAIG J. LANDRY, ATTORNEY AT LAW	3/16/07 Date

WARNING It is a crime to knowingly make false statements to the United States on this or any other similar Form. Penalties upon conviction can include a fine or imprisonment. For details see Title 18 US Code Section 1001 and 1010

APPENDIX Q

Smith Plaintiffs' Response To Defendants' Statement Of Uncontested Material Facts, Dated March 24, 2009

In Civil Action No. 2:08-cv-01626

[Caption Omitted]

SMITH PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS

NOW COMES the Plaintiffs, Paul and Irma Smith (the "Smiths") and solely for purposes of their Memorandum in Opposition to Defendants' Motion for Summary Judgment, respond to Defendants' Statement of Uncontested Material Facts as follows:

1. Plaintiffs do not dispute the facts alleged in paragraph 1.

2. Plaintiffs dispute the facts alleged in paragraph 2, in that the HUD-1 Settlement Statement shows that the Smiths paid an origination fee in the amount of $5,107.44, and not a loan discount fee in this amount. *See* Ex. 9.

3. Plaintiffs dispute the alleged facts in paragraph 3, in that if the $5,107.44 fee was actually charged as a loan discount fee, then the loan discount fees were paid to lower their interest rates, but such a service was not provided, and that the appraisal services fees were paid, but no, nominal and/or duplicative work was provided. *See* Exs. 9, 31 and 32.

4. Plaintiffs dispute the alleged facts in paragraph 4, in that this loan was closed over two years ago, and only after the filing of this lawsuit, did Quicken suggest that a mistake had been made with respect to these fees. The HUD-1 is clear that a loan origination fee was paid, and not a discount fee. *See* Defs.' Memo. in Smith case, fn. 1; *see also*, Ex. 9.

5. Plaintiffs dispute the alleged facts in paragraph 5, in that the documents referenced do not "establish" anything with respect to these fees. Only the HUD-1 establishes which fees were charged and in what amounts. *See* Ex. 9.

6. Plaintiffs dispute the alleged facts in paragraph 6, as some of the loan documents reference a "premium," which may refer to a portion of the discount fees that may have been split and/or paid to another person or entity. *See* Exs. 18, 22 and 32. Plaintiffs request additional time for discovery to investigate this claim.

7. Plaintiffs dispute the alleged facts in paragraph 7, in that their HUD-1 does not indicate that they paid a loan discount fee to Quicken. *See* Ex. 9.

8. Plaintiffs do not dispute the alleged facts in paragraph 8.

9. Plaintiffs dispute the alleged facts in paragraph 9, in that Quicken's website outlines what services are provided in exchange for the payment of loan processing fees. *See* Exs. 14 and 15.

10. Plaintiffs dispute the facts alleged in paragraph 10, in that Quicken and Title Source are

affiliated entities which are owned by the same parent company, and disclosures provided to Plaintiffs suggest that Quicken may benefit from the referral and fees paid by the Plaintiffs due to the affiliation. *See* Ex. 12.

11. Plaintiffs dispute the facts alleged in paragraph 11, in that Quicken and TSI Appraisal are one in the same, and the $80 fee was charged for no, nominal or duplicative work performed. *See* Ex. 12.

12. Plaintiffs dispute the facts alleged in paragraph 12, in that Quicken and TSI Appraisal are one in the same, and any contract entered into by Quicken with the Plaintiffs, also applied to Title Source for purposes of these loan transactions. *See* Ex. 12.

RESPECTFULLY SUBMITTED,

[Attorneys for Plaintiffs]

[Signatures and Certificates of Service Omitted]

PETITIONER'S BRIEF

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
NOV 2 5 2011
OFFICE OF THE CLERK

No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONERS

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Jeffrey L. Fisher
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SUPREME COURT
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QUESTION PRESENTED

Whether Section 2607(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioners here, and plaintiffs-appellants below, Tammy Foret Freeman and Larry Scott Freeman; Paul Smith and Irma Smith; and John J. Bennett, III, and Stacey B. Bennett, on behalf of themselves and a class of similarly situated persons.

Quicken Loans, Inc. is the sole respondent here, and was the defendant-appellee below.

Title Source, Inc. was a defendant in the district court. Although Title Source prevailed in the district court, and although petitioners did not pursue their claims against Title Source on appeal, the caption of the court of appeals' decision lists Title Source as a defendant-appellee.

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BRIEF FOR PETITIONERS

Petitioners Tammy Foret Freeman *et al.* respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 626 F.3d 799. The district court's opinion (Pet. App. 19a-70a) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 17, 2010. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on February 15, 2011, which this Court granted on October 11, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of the following provisions of the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-544, as amended and codified at 12 U.S.C. § 2601 *et seq.*, are included in the appendix to this brief: § 2601 (Congressional findings and purpose); § 2604 (Special information booklets); § 2607 (Prohibition against kickbacks and unearned fees); and § 2617 (Authority of Bureau).

The appendix also contains relevant regulations, including 24 C.F.R. § 3500.4 and 24 C.F.R. § 3500.14, as well as relevant portions of a Statement of Policy issued by the Department of Housing and Urban Development, 66 Fed. Reg. 53,052 (2001).

STATEMENT OF THE CASE

Petitioners obtained residential mortgages from respondent Quicken Loans. At closing, Quicken charged petitioners a "loan discount fee," but petitioners allege that it did not give them any loan discount. Petitioners filed suit, alleging that respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), by imposing an unearned charge. The Fifth Circuit held that even if Quicken did nothing to earn the fee, it did not violate the statute because it kept all the unearned money for itself and did not divide the fee with anyone else. Properly construed, the court held, RESPA "prohibits only kickbacks and referral fees." Pet. App. 15a.

I. Statutory and Regulatory Framework

A. Real Estate Settlement Procedures Act

In 1974 Congress enacted the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, in response to the "unnecessarily high settlement charges caused by certain abusive practices" in the real estate settlement industry. 12 U.S.C. § 2601(a). The statute addresses these abuses through a series of interrelated provisions.

One section of the statute requires settlement service providers to "clearly itemize all charges imposed upon the borrower . . . in connection with the settlement," using a form developed by the Department of Housing and Urban Development (HUD). 12 U.S.C. § 2603. That form, in turn,

requires the disclosure of any "charge (points) for the specific interest rate chosen."[1]

Section 2607 then prohibits providers from collecting the disclosed fees unless they were earned. Entitled "Prohibition against kickbacks and unearned fees," the provision has two pertinent subsections. 12 U.S.C. § 2607. The first expressly prohibits kickbacks:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Id. § 2607(a). Subsection (b) then addresses unearned fees:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

Id. § 2607(b).[2]

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[1] Department of Housing and Urban Development, OMB Approval No. 2502-0265, Settlement Statement (HUD-1 ¶ 802 (2010)), *available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf.

[2] The codified version of the statute in the U.S. Code includes a subsection title for Section 2607(b), "Splitting

B. Administrative Intepretations

Congress directed HUD "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a). [3] Congress further encouraged public reliance on HUD's interpretation of the statute by requiring the agency to produce special information booklets to help consumers better "understand the nature and costs of real estate settlement services," *id.* § 2604, and by exempting from liability "any act done or omitted in good faith in conformity" with any HUD "rule, regulation, or interpretation." *Id.* § 2617(b).

For more than thirty-five years HUD has interpreted RESPA to prohibit unearned charges whether or not they are divided with another provider.

Consumer Booklet. The agency's 1976 consumer booklet explained that RESPA prohibits kickbacks and, in addition, "[i]t is *also* illegal to charge or accept a fee or part of a fee where no

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charges." That title was not a part of the public law enacted by Congress. *See* REPSA, Pub, L. No. 93-533, § 8(b), 88 Stat. 1727.

[3] On July 21, 2011, Congress transferred HUD's RESPA-related responsibilities to the Consumer Financial Protection Bureau (CFPB). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. The CFPB, in turn, has adopted HUD's existing regulations as its own. 76 Fed. Reg. 43,570, 43,571 (July 21, 2011). For simplicity, this brief will refer to HUD as the author of the regulations and administrator of the statute.

service has actually been performed." 41 Fed. Reg. 20,279, 20,289 (May 17, 1976) (emphasis added).

Notice-And-Comment Regulations. HUD codified that construction of the statute in its notice-and-comment regulations – commonly known as "Regulation X" – in 1992.[4] After quoting the text of Section 2607(b), the amended regulations provide:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.

24 C.F.R. § 3500.14(c).

Report to Congress. In a 1998 report to Congress, the agency reiterated that:

> HUD has consistently held that the provisions of [Section 2607(b)] apply in various situations, such as where one settlement service provider (1) receives an unearned fee from another provider, (2) charges the consumer for third-party services and retains an unearned fee from the payment received, or (3) accepts any portion of a charge other than for services actually performed.[5]

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[4] Prior to 1992, HUD's regulations largely repeated the statutory language of Section 2706(b). *See* 24 C.F.R. § 3500.14(b) (1977) (initial regulations).

[5] BD. OF GOVERNORS OF THE FED. RESERVE SYS. & DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO CONG. CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 29 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

Statement of Policy. In 2001, the Seventh Circuit nonetheless concluded that the statute extended only to kickbacks, and that HUD had not clearly expressed a contrary interpretation. *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). In response, HUD formally issued a Statement of Policy, published in the Federal Register, stating unambiguously that:

> Section [2607(b)] forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052, 53,058 (Oct. 18, 2001) (Statement of Policy).[6]

Amicus Briefs. In no fewer than seven amicus briefs filed in the federal courts of appeals, HUD has consistently repeated this interpretation of the statute and its regulations.[7] At this Court's

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[6] Relevant portions of the Statement of Policy are reproduced in Appendix C to this brief.

[7] *See* Br. for the United States as *Amicus Curiae* Supporting Reversal, *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002) (No. 01-2318), *available at* 2002 WL 32351432; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (No. 02-2285), *available at* 2002 WL 32115107;

invitation, the Solicitor General reiterated that position in a brief filed in this case and signed by the General Counsel for HUD's successor agency. *See* U.S. Invitation Br. 3, 9.

II. Factual Background

The Freemans, Bennetts, and Smiths all secured mortgages in Louisiana from respondent Quicken Loans.

Quicken charged the Freemans $980, and the Bennetts $1100, for a "loan discount fee" at the closing on their mortgages. Pet. App. 21a n.2, 22a n.6. A "loan discount fee" is money borrowers pay to purchase "points." U.S. DEP'T OF HOUS. & URBAN DEV., HUD-398-H[4], BUYING YOUR HOME: SETTLEMENT COSTS AND INFORMATION 6, 14 (1997).[8] In industry parlance, such "points" are "a one-time charge imposed by the lender or broker to lower the

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Br. for the United States as *Amicus Curiae* Supporting Affirmance, *Haug v. Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003) (No. 02-2458), *available at* 2002 WL 32144590; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th Cir. 2003) (No. 02-13930-DD), *available at* 2002 WL 32366238; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49 (2d Cir. 2004) (No. 03-7665), *available at* 2003 WL 24072306; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d Cir. 2005) (No. 03-4273), *available at* 2004 WL 3759909; Letter Br. for the United States as *Amicus Curiae, Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007) (No. 06-0409).

[8] *Available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12893.pdf.

rate at which the lender or broker would otherwise offer the loan." *Id.* at 14-15.[9] In this case, however, petitioners allege that Quicken charged the loan discount fee but did not provide petitioners any corresponding reduction in their interest rate. *See* Pet. App. 2a.

Quicken charged the Smiths a $575.00 "loan processing fee" and a duplicative $5,107.44 "loan origination" fee. Pet. App. 22a n.4. Quicken later claimed that "the loan origination" fee was, in fact, a mislabeled "loan discount fee" like the one imposed on the Freemans and Bennetts. Pet. App. 2a-3a. However labeled, the Smiths allege that they received no loan discount or any other service in exchange for the fee. *Id.*

III. Procedural History

1. On February 19, 2008, the Freemans filed suit in state court against Quicken, alleging, as relevant here, violations of Section 2607(b) of RESPA. Pet. App. 20a.[10] Quicken removed the case to federal

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[9] *See also* 15 U.S.C. § 1639c(b)(2)(C)(iii) (defining, for purposes of another consumer protection statute, the term "bona fide discount points" to mean "loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage").

[10] Petitioners also brought claims against the title company that conducted the closing, but those claims were ultimately dismissed, Pet. App. 70a, and petitioners do not challenge that dismissal here. Petitioners further brought state law claims premised upon the alleged RESPA violations. Pet. App. 3a, 14a & n.15. Those claims were dismissed along with petitioners' RESPA claims, but would be revived should petitioners' RESPA

court, where it was consolidated with a nearly identical suit filed by the Smiths and a putative class action filed by the Bennetts. Pet. App. 21a-22a.

Quicken moved for summary judgment on petitioners' RESPA claims on the sole ground that "Section 8(b) only prohibits fee splitting." Def.'s Mem. Supp. Summ. J. 5; *see also* J.A. 54-55 (Def's Mot Summ. J. ¶ II).[11] Quicken argued that even if it had not provided anything in exchange for the challenged fees, petitioners' claims should fail "because neither of the challenged fees were split or otherwise shared with any other party." *Id.*

The district court agreed and granted summary judgment to Quicken. After reviewing HUD's 2001 Statement of Policy and the conflicting circuit court opinions, the district court found "the circuit decisions that have held that Section [2607(b)] only applies to divided fees" more persuasive. Pet. App. 66a. And because it concluded that this result was required by the "plain language of Section [2607(b)]," it refused to defer to HUD's contrary interpretation. *Id.*[12]

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claims be reinstated. *Id.*

[11] In the district court, Quicken filed two materially identical motions – one with respect to the suits filed by the Freemans and the Bennetts, and another regarding the Smiths' suit. The citations in this brief refer to the Freeman/Bennett filings.

[12] In its summary judgment reply brief, Quicken briefly raised for the first time the additional arguments that (1) a loan discount fee is not a charge for a "settlement service" within the meaning of RESPA; and that (2) "Plaintiffs' theory rests upon the incorrect presumption that 'discount points' may only be

2. The Fifth Circuit affirmed, holding "that the language of RESPA § [2607(b)] is unambiguous and does not cover undivided unearned fees." Pet. App. 7a. Instead, "RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services." Pet. App. 15a.

First, the court examined the phrase "[n]o person shall give and no person shall accept." Pet. App. 7a. The "use of the conjunctive 'and,'" the court concluded, implies that "the provision requires two parties each committing an act," one giving and one accepting payment. *Id.* (citation omitted). The Fifth Circuit found further support in the fact that the prior subsection, Section 2607(a), used similar language while expressly prohibiting "kickbacks." Pet. App. 8a. "To be consistent with" Subsection (a), the court concluded, Subsection (b) "should require two culpable actors as well." *Id.*

Next, the court looked at the words "portion, split, or percentage," and found that "all three words require less than 100% or the whole of something." Pet. App. 8a-9a. The court acknowledged that "certain statutes use 'any portion' and 'any percentage' to include situations that involve the entirety of something." Pet. App. 9a (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 118-19 (2d Cir. 2007) (collecting examples)). But, invoking the canon of *noscitur a sociis*, the Fifth Circuit reasoned

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charged where there is a quantifiable interest rate reduction." Def.'s Reply Mem. Supp. Summ. J. 9, 10. The district court did not decide whether either argument was preserved, having resolved the case on other grounds. Pet. App. 65a-67a, 69a.

that Congress intended a narrower interpretation of "percentage" and "portion" in this provision because it also included the word "split," which "requires dividing a single thing among several parties." Pet. App. 9a-10a.

Finally, the court rejected petitioners' argument that the court should defer to HUD's interpretation of the statute as encompassing more than kickbacks. Pet. App. 11a-14a. "Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law." Pet. App. 12a. The 2001 Statement of Policy, the court wrote, "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion." Pet. App. 13a.[13]

3. Judge Higginbotham dissented. He explained that he "would, in the main, take the path set forth in

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[13] Quicken also reiterated on appeal its belated argument that loan discount fees are not necessarily paid to secure a loan discount, although it did not assert that the loan discount fees petitioners paid in this case were for some other service (much less identify what that service was). *See* C.A. Appellee Br. 24-25. The Fifth Circuit did not address that contention or decide whether the argument was preserved.

The Fifth Circuit also noted that "Quicken cursorily contends that the loan discount fees are not settlement services, and therefore are not covered by the statute," but ultimately did not decide whether Quicken had waived the argument by failing to raise it in its initial motion for summary judgment or by failing to adequately brief the question on appeal. Pet. App. 4a n.1.

the Second Circuit's well-reasoned opinion in" *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007). Pet. App. 15. In *Cohen*, the Second Circuit rejected the claim that Section 2607(b) of RESPA was unambiguously limited to kickbacks. 498 F.3d at 113. The phrase "any portion, split, or percentage," the court concluded, could extend to cases in which a defendant kept the entirety of an unearned charge for itself. *Id.* at 117-20.

The court in *Cohen* further rejected any reliance on the *noscitur a sociis* canon. "Whether or not any one noun" in the statutory phrase could be read to require a division of unearned fees, the Second Circuit explained, Congress's "use of the expansive modifier 'any' in conjunction with all three words" precluded the conclusion that the statute unambiguously applied only to kickbacks. 498 F.3d at 120.

The Second Circuit thus found that Section 2607(b) could "plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured." 498 F.3d at 120. At the same time, the court concluded that this permissible interpretation was not compelled by the language of the statute, resulting in an ambiguity the court resolved by deferring to HUD's Statement of Policy. *Id.* at 124-26.

While Judge Higginbotham disagreed with the Second Circuit's decision to afford *Chevron* deference to HUD's Statement of Policy, Pet. App. 15a, he adopted the same interpretation of the statute. Prohibiting unearned fees, he explained, "strikes at a core objective of RESPA: promoting transparency of costs associated with settlement." Pet. App. 17a.

Although "the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe that they are paying for something they are not." *Id.*

SUMMARY OF ARGUMENT

In the Fifth Circuit's view, RESPA allows service providers to charge consumers for services they never performed so long as they keep all the unearned money for themselves. The agency Congress charged with administering and interpreting RESPA reads the statute otherwise, explaining in multiple forms over many years its position that Section 2607(b) prohibits all unearned fees, whether divided or not. That longstanding view reflects the best reading of the statute and, at the very least, is a reasonable interpretation entitled to deference.

I. Section 2607(b) prohibits accepting "any portion, split, or percentage" of an unearned fee. The Fifth Circuit read this language to require that the defendant split the unearned charge with a third party. But in common usage and throughout the U.S. Code, the phrases "any portion" and "any percentage" also include the entirety, or one hundred percent. Federal embezzlement statutes, for example, prohibit those entrusted with public funds from misappropriating "any portion" of that money. No one would seriously contend that such a statute would permit someone to embezzle *all* of the funds entrusted to her care.

The Fifth Circuit also believed that the phrase "[n]o person shall give and no person shall accept," implied that the statute required both a culpable giver and a culpable receiver to establish a violation. But that is not a natural, much less a necessary,

reading of this language. In this case, there were two parties to the transaction – Quicken required petitioners to "give," and Quicken then "accept[ed]" the unearned charge. To the extent a culpability requirement is reasonably read into the statute, the provision nonetheless does not require both a culpable giver and a culpable receiver in any one transaction. For example, a law providing that "no person shall knowingly send and no person shall knowingly accept child pornography" is most naturally understood to prohibit knowingly sending child pornography, even if it is never knowingly received (either because it gets lost in the mail or because it is mistakenly sent to an innocent recipient). Section 2607(b) likewise establishes two independent prohibitions.

The Fifth Circuit's reading also renders Section 2607(b) largely superfluous. The immediately preceeding provision – Section 2607(a) – already broadly prohibits kickbacks, including those paid from unearned fees. The distinct language of Section 2607(b) must serve some independent purpose. As indicated in the Section's title – "Prohibition against kickbacks and unearned fees" – that purpose was to ban all unearned fees, even if they are not shared with another provider.

Reading Section 2607(b) to do little more than prohibit the kickbacks already banned by subsection (a) would also thwart RESPA's goal of protecting consumers from "abusive practices" that lead to "unnecessarily high settlement charges." 12 U.S.C. § 2601(a). Charging fees for services never provided is an abusive practice that results in the same increase in settlement costs to the consumer whether

the provider shares its ill-gotten gains with another provider or keeps them all for itself.

II. If there is any question regarding the scope of the statute, the ambiguity should be resolved by deferring to the interpretation of the agency Congress charged with administering the statute. Congress expressly gave HUD authority to issue "regulations" and "interpretations" to achieve the purposes of the statute. 12 U.S.C. § 2617(a). The agency has exercised both powers to the same effect, declaring in multiple formats for the past thirty-five years that RESPA prohibits undivided, unearned fees. In 1992, for example, HUD established through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c) (1993). The agency has moreover consistently interpreted that regulation, as well as the statute itself, as precluding any suggestion that an unearned fee must be split to violate the statute. The regulation, so construed, is entitled to *Chevron* deference.

Even if the regulation were unclear, HUD's 2001 Statement of Policy is not. The Statement "specifically interprets [Section 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." 66 Fed. Reg. 53,052, 53,057 (2001). The Fifth Circuit held that the Statement of Policy was not eligible for *Chevron* deference because it was issued without notice and comment. But this Court has specifically disavowed any intent to limit *Chevron* deference to notice-and-comment rulemaking. And in this case, Congress expressly authorized HUD to exercise its delegated

interpretive authority through either regulations or interpretations. Moreover, the Statement of Policy was the product of a formal, deliberative process undertaken by high-level officials of an expert agency, and advances an entirely reasonable interpretation of the statute.

ARGUMENT

For three and a half decades, the Department of Housing and Urban Development (and, since July, 2011, the Consumer Finance Protection Bureau) has construed RESPA to prohibit all unearned charges and not simply kickbacks. The Fifth Circuit's contrary interpretation is inconsistent with the language, structure, and purposes of the statute, as well as the deference owed to the agencies Congress charged with administering the statute.

I. The Text, Structure, And Purposes Of RESPA Establish That HUD Properly Construed Section 2607(b) To Prohibit Undivided, Unearned Charges.

A. The Plain Text Of Section 2607(b) Prohibits All Unearned Charges.

Consistent with its title, Section 2607 of RESPA regulates two abusive practices: "kickbacks and unearned fees." 12 U.S.C. § 2607. Subsection (a) expressly prohibits kickbacks. *See id.* § 2607(a) ("No person shall give and no person shall accept any . . . kickback"). And on its face, Subsection (b) prohibits a settlement services provider from accepting any unearned fee. That is, by charging petitioners a loan discount fee without actually providing any loan discount, Quicken "accept[ed]" a "portion, split, or percentage" of a settlement service

charge (*i.e.*, one hundred percent of the loan discount fee) "other than for services actually performed." *Id.* § 2607 (b).

The Fifth Circuit's objections to this interpretation are unavailing.

1. The court of appeals construed the statutory phrase "any portion, split, or percentage" to require that "two parties share something." Pet. App. 8a. "The definitions of all three words," the court said, "require less than 100% or the whole of something." *Id.* 9a. But that is plainly incorrect.

a. In common usage, the phrase "any portion" encompasses the whole. For example, a mother who tells her son that she does not want him to spend any portion of his allowance on comic books is not, of course, permitting him to spend *all* of his allowance on comic books. Likewise, federal embezzlement statutes frequently ban those entrusted with public money from embezzling "any portion" of those funds. *See* 18 U.S.C. § 648.[14] No one would seriously contend that such a statute permits officials to misappropriate public funds so long as they embezzle *everything* entrusted to them. Similarly, a lender plainly would violate the federal law prohibiting it from collecting "any portion of the interest on the

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[14] *See also, e.g.*, 18 U.S.C. § 644 (defining embezzlement using the phrase "*any portion* of the public money") (emphasis added); 18 U.S.C. § 653 (same); 19 U.S.C. § 1620 (making "[a]ny officer of the United States who directly or indirectly receives, accepts, or contracts for *any portion* of the money which may accrue to any person making such detection and seizure" guilty of a felony) (emphasis added).

note which is payable by the Secretary," 20 U.S.C. § 1077(a)(2)(E), if it collected *all* of the interest payable by the Secretary.

At the same time, one hundred percent is obviously a "percentage." For example, to say that a tax is assessed as a "percentage" of the value of a transaction does not exclude a tax rate of one hundred percent. *See, e.g.*, 26 U.S.C. § 4975(a)-(b) (imposing a tax rate on certain "prohibited transactions" of fifteen percent of the value of the transaction for a first offense and one hundred percent for a subsequent offense); *see also* 42 U.S.C. § 1396a(*l*)(4)(B) (allowing certain states to substitute "any percentage" for the regularly prescribed 75 percent or 133 percent of the income official poverty line in determining eligibility for medical assistance); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 481 (2002) (acknowledging that "percent" in 42 U.S.C. § 1396r-5(d)(3)(A)-(B) can mean 150 percent).

b. If there was any cause to doubt whether Congress intended "portion" and "percentage" to carry their ordinary breadth, Congress removed it by referring to "*any* portion . . . or percentage." 12 U.S.C. § 2607(b) (emphasis added). This Court repeatedly has recognized that "'the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1993) (defining "any" as "great, unmeasured, or unlimited in amount, quantity, number, time, or extent"). "The word *any*

excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904). If Congress truly had intended the Fifth Circuit's narrow construction of the words "portion" and "percentage," it surely would have omitted "any" from the statute.

c. Giving "portion" and "percentage" their natural breadth also avoids rendering those words surplusage. The statute already prohibits a "split" of unearned fees. The Fifth Circuit offered no explanation why Congress would use three words to express an idea already fully encompassed in "split" alone. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts should avoid construing a statute to render terms surplusage); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 702 (1995) (holding that the lower court erred in giving the term "'harm' essentially the same function as other words in the definition, thereby denying it independent meaning").

2. The Fifth Circuit nonetheless found that this surplusage was required by the canon of *noscitur a sociis*. This canon, the court explained, "dictates that words grouped in a list should be given related meaning." Pet. App. 9a (citation omitted). For that reason, the court concluded that all three terms must share the same basic meaning as the word "split" standing alone. *Id.* 9a-10a.

This "argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006) (rejecting similar misuse of *noscitur* canon); *see also Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) ("That a word may be

known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association."). For instance, a rule banning "liquids, alcohol, or fluids" on airplanes would never be read to prohibit only alcohol on the premise that the broader terms "liquids" and "fluids" must be given a narrow meaning in light of their conjunction with "alcohol." Yet that is the logic the Fifth Circuit applied to RESPA in this case: it read the broader words "portion" and "percentage" to mean nothing more than the more specific term "split" standing by itself.

To be sure, some overlap among the terms is inevitable under any construction. Under either petitioners' or respondent's interpretation, for example, the words "portion" and "percentage" cover much of the same ground.[15] But that is not a justification for the construction adopted by the Fifth Circuit, which renders both words entirely without effect when an alternative interpretation is available that limits redundancy and gives the statute the breadth naturally implied by the ordinary meaning of the statutory language.

3. The Fifth Circuit also asserted that Section 2607(b) "was clearly aiming at an exchange or transaction, not a unilateral act" because the statute

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[15] Under petitioner's interpretation, however, they are not entirely duplicative. A kickback exceeding the amount of an unearned fee – for example, payment of double the amount of a loan processing charge to a real estate agent for a first time referral to a lender in order to encourage repeat business – would constitute a "percentage" of the charge (*i.e.*, two hundred percent) even if it were not easily seen as a "portion" of the fee.

prohibits both the giving and the accepting of an unearned fee. Pet. App. 7a (citation omitted). The court asserted that "[t]he term 'and' normally means that both of the listed conditions must be satisfied." *Id.*

Even if that were so, it would not help Quicken here. The unearned discount fee in this case *was* exchanged between two parties – Quicken required petitioners to "give" the fees, and Quicken indisputably "accept[ed]" them.[16]

That being true, the only way the statute would not apply here would be if it required not only a giver and an acceptor, but a *culpable* giver and a *culpable* acceptor. Pet. App. 8a. But there is no such requirement in the text, nor can one be reasonably implied.

The phrase "[n]o person shall give and no person shall accept" creates two separate prohibitions, one on giving an unearned fee and one on accepting an unearned fee. Only one of these actions is required

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[16] This is not to say that a consumer may be held liable for paying what turns out to be an unearned fee. As the Eleventh Circuit has observed, "a consumer could not be liable as the giver of an unearned portion of a fee because a consumer will always intend to pay the fee for services that are actually performed." *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Moreover, the statute expressly provides that "[a]ny person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable" for treble damages "*to the person* or *persons charged* for the settlement service." 12 U.S.C. § 2607(d)(2) (emphasis added). It would make no sense to construe the statute to render a consumer liable to herself under a statute expressly enacted for the protection of consumers, *see id.* § 2601.

for a violation to occur. For example, a statute providing that "[n]o person shall make and no person shall solicit or knowingly accept any political contribution in a building owned by a governmental entity," Fla. Stat. § 106.15(4), is plainly violated by a person who makes such a contribution, even if no one "knowingly accept[s]" it (for example, because the acceptor does not know he is in a government building).[17]

Had Congress intended to limit Section 2607(b) to kickbacks, it easily could have written the statute to say so clearly. For example, it could have provided that "it shall be unlawful for two or more persons to exchange any portion, split, or percentage of any charge . . . ." *Compare* 18 U.S.C. § 1511(a) ("It shall be unlawful for *two or more persons to conspire* to obstruct the enforcement of [certain] criminal laws . . . .") (emphasis added). Or it could have

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[17] In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), this Court confronted a similarly phrased federal statute which provided that "[n]o person shall make a contribution in the name of another person . . . and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f; *see McConnell*, 540 U.S. at 232. Rather than embracing the Fifth Circuit's view that the use of "and" requires that "both of the listed conditions must be satisfied," Pet. App. 7a, this Court described the provision as establishing two independent proscriptions, prohibiting "any person from 'mak[ing] a contribution in the name of another person' *or* 'knowingly accept[ing] a contribution made by one person in the name of another.'" *McConnell*, 540 U.S. at 232 (emphasis added). That reading is obviously correct – a donor would violate the statute by making an unlawful contribution even if the candidate ultimately refused to accept it.

declared that "two or more persons shall not split any portion of any charge . . . ." Instead, Congress chose language that does not naturally create a two-party requirement. *See* H.R. Rep. No. 93-1177, at 13 (1974) (describing Section 2607(b) as prohibiting "the giving *or* accepting of any portion of any charge made or received for performing a real estate settlement service in connection with a transaction involving a federally-related mortgage loan other than for services rendered") (emphasis added).

B. The Structure Of Section 2607 Further Indicates That 2607(b) Applies To Undivided, Unearned Charges.

The Fifth Circuit further purported to find support for its interpretation in the structure of Section 2607. It observed that both Subsections (a) and (b) of the provision began with the phrase "No person shall give and no person shall accept . . . ." Relying on the principle that "'[a] term appearing in several places in a statutory text is generally read the same way each time it appears,'" the court of appeals concluded that because Subsection (a) requires two parties, Subsection (b) "should require two culpable actors as well." Pet. App. 8a (citation omitted). The court's analysis is flawed. In fact, the structure of the statute strongly supports the opposite conclusion.

1. The premise of the Fifth Circuit's analysis – that Subsection (a) requires two culpable parties by virtue of the language it shares with Subsection (b) – is incorrect. To the extent Subsection (a) requires two culpable parties, that is because the it applies only to payments made pursuant to an "agreement or understanding." 12 U.S.C. § 2607(a).

2. The Fifth Circuit's construction, on the other hand, renders Subsection (b) largely surplusage Having already prohibited "kickbacks" by name in Subsection (a), Congress presumably had something else in mind for Subsection (b). The title of the Section suggests, and the language of the Subsection confirms, that the role is prohibiting unearned fees. *See* 12 U.S.C. § 2607 ("Prohibition against kickbacks *and* unearned fees") (emphasis added).

Admittedly, it is possible to conjure a handful of hypothetical situations in which Subsection (b) performs some independent function even under the court of appeals' interpretation. For example, Subsection (a) prohibits kickbacks only "pursuant to [an] agreement or understanding." Some courts have speculated that Subsection (b) targets gratuitous kickbacks that would otherwise fall outside the scope of Subsection (a). *See Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 266 (4th Cir. 2002). But it is hard to imagine why Congress would go through the trouble of enacting Subsection (b) simply to repeal a limitation it had just written into Subsection (a). It would have been easier, and clearer, to simply omit the limitation from Subsection (a) in the first place.

HUD's construction of the statute is by far the more natural, affording Subsection (b) the important independent function of protecting consumers from fraudulent charges for services never performed. While petitioners' interpretation leaves some overlap between Subsections (a) and (b) – a traditional kickback violates both – that is true under the Fifth Circuit's interpretation as well. As between a construction that entails a degree of unavoidable overlap and one that renders an entire subsection

almost entirely surplusage, the former is by far more likely the one Congress intended.

C. Banning Undivided, Unearned Charges Is Consistent With RESPA's Core Purpose Of Preventing Abusive Practices That Increase Settlement Costs.

The Fifth Circuit pointed out that the statutory purposes section of the statute lists "the elimination of kickbacks or referral fees" as among Congress's objectives but does not expressly mention unearned fees. Pet. App. 10a. (quoting 12 U.S.C. § 2601(b)(2)). From this, the court concluded that RESPA was intended to "explicitly and *exclusively* prohibit[] kickback and referral fees." *Id.* (emphasis in original). That is simply wrong.

1. While it is true that Congress intended RESPA to address kickbacks, the Fifth Circuit ignored the first, overarching expression of Congress's intent in enacting RESPA:

> The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are *protected from unnecessarily high settlement charges caused by certain abusive practices* that have developed in some areas of the country.

12 U.S.C. § 2601(a) (emphasis added).

For most Americans, purchasing a home is "one of the largest and most complex financial transactions in their lives." 59 Fed. Reg. 37,360,

37,362 (July 21, 1994). Congress recognized that consumers' "lack of understanding . . . about the settlement process and its costs" made them vulnerable to abuse. S. REP. No. 93-866, at 2. Padding closing costs with fraudulent fees for services never rendered is indisputably an "abusive practice[]" that inflates settlement costs unnecessarily. In this case, for example, by charging fees for loan discounts it never provided, Quicken increased petitioners' collective settlement costs by thousands of dollars. This had a far greater effect on petitioners' settlement costs than any ten-dollar kickback would have. *Compare Weizeorick v. ABN Amro Mortg. Grp., Inc.*, 337 F.3d 827, 829 (7th Cir. 2003). Consistent with its broader objectives, Congress thus regulated not only kickbacks, but also "unearned fees, and unreasonable escrow accounts," each of which "increase[s] settlement costs to home buyers without providing any real benefits to them." S. REP. No. 93-866, at 3, 2 (1974); *see also* H.R. REP. No. 93-1177, at 3 (1974) (same).

There is ample basis to believe that without protection against unearned fees, consumers would be subject to all manner of fraudulent charges at closing. Indeed, petitioners' experiences are far from uncommon. HUD has repeatedly determined that other lenders have engaged in the same practice of charging loan discount points without providing any reduction in interest rate,[18] and has conveyed those findings to Congress on more than one occasion.[19]

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[18] *See* HUD Audit Case No. 2008-SE-1004, at 8-10 (2008), *available at* http://www.hudoig.gov/pdf/auditreports/WA/

In light of the substantial risk to consumers, and Congress's express purpose of protecting homebuyers from abusive practices that lead to excessive settlement fees, it is difficult to believe that Congress intended to draw a critical distinction between a settlement service provider who retained 99.99 percent of an unearned fee for itself, and one who retained 100 percent of the fee. The effect on the consumer, and the provider's culpability, is materially the same in either case. Nor did the Fifth Circuit offer any explanation why Congress would have intended to prohibit even small unearned fees when they are split, but turn a blind eye when providers falsely charge exorbitant fees for services they never provided, so long as they retain the entirety of the ill-gotten gains for themselves.

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ig0801004.pdf; HUD Audit Case No. 2005-FW-1019, at 5 (2005), *available at* http://archives.hud.gov/offices/oig/reports/files/ig561019.pdf; HUD Audit Case No. 2005-FW-1014, at 5-6 (2005), *available at* http://archives.hud.gov/offices/oig/reports/files/ig561014.pdf,; HUD Audit Case No. 2005-FW-1017, at 6 (2005), *available at available at* http://archives.hud.gov/offices/oig/reports/files/ig561017.pdf; HUD Audit Case No. 2004-LA-1005, at 3-6 (2004), *available at* http://archives.hud.gov/offices/oig/reports/files/ig491005.pdf.

[19] *See* U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2008 THROUGH SEPTEMBER 30, 2008, at 12-13, *available at* http://www.hudoig.gov/pdf/sar/sar60.pdf; U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2005 THROUGH SEPTEMBER 30, 2005, at 14, *available at* http://www.hudoig.gov/pdf/sar/sar54.pdf.

2. Quicken suggests that Congress would have drawn such distinctions to prevent Section 2607(b) from becoming "a price-control mechanism." BIO 25. But petitioners do not claim that Quicken violated the statute by charging an unreasonable price for a service it actually performed.[20] Rather, they allege that Quicken did not provide the service for which that they had paid. As Judge Higginbotham explained, determining whether a rate is reasonable is very different from "determining whether *any* service was provided" at all. Pet. App. 17a (emphasis added). Prohibiting providers from charging for services never performed is no more a form of price-control than are statutes prohibiting fraud.

To be sure, petitioners' interpretation of the statute requires courts to decide whether a charge was earned. But so does Quicken's. Respondent acknowledges that once a fee is split, the question becomes whether the recipient's share was "for services actually performed." 12 U.S.C. § 2607(b). To the extent that determination may be difficult in some cases, the difficulty is an unavoidable consequence of Congress's decision to prohibit in Section 2607(b) certain fees only if they are unearned. Any complaints about that choice are properly directed to Congress, not this Court.

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[20] As the Fifth Circuit observed, Pet. App. 5a-6a, all circuits agree that a provider does not violate the statute simply by overcharging for a service actually provided.

II. If Section 2607(b) Is Ambiguous, HUD's Interpretation Of The Statute Is Entitled To Deference.

"[W]hen it appears that Congress delegated authority to [an] agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), courts must accept the agency's resolution of any statutory ambiguity unless the statute "cannot bear" the agency's reading, *see Sullivan v. Everhart*, 494 U.S. 83, 91 (1990). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In this case, Congress charged HUD with responsibility to authoritatively resolve any statutory ambiguity under RESPA, delegating it the power "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions . . . as may be necessary to achieve the purposes of [the statute]." 12 U.S.C. § 2617(a). Pursuant to that grant of authority, HUD has repeatedly construed RESPA to prohibit unearned fees whether split or not. To the extent the statute itself does not already resolve that question, HUD's reasonable interpretation controls.

A. The Regulations, As Construed By HUD, Merit *Chevron* Deference.

Deference is due first, and most straightforwardly, to HUD's interpretation as embodied in its notice-and-comment regulations, known collectively as Regulation X.

As originally enacted, the regulation largely restated the language of Section 2607(b). 24 C.F.R. § 3500.14(b) (1977). In 1992, HUD amended the regulation to, among other things, address "certain matters which were previously only covered by informal legal or program advice." 57 Fed. Reg. 49,600, 49,601 (Nov. 2, 1992). Consistent with the agency's prior understanding of the statute[21] the Secretary amended the regulation to add that:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 C.F.R. § 3500.14(c).[22]

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[21] *See* 41 Fed. Reg. 20,279, 20,289 (May 17, 1976) (RESPA consumer information booklet) (explaining that in addition to RESPA's ban on kickbacks, "[i]t is *also* illegal to charge or accept a fee or part of a fee where no service has actually been performed") (emphasis added).

[22] The Subsection is entitled "No split of charges except for actual services performed." However, any inference from this language that HUD views the statute as prohibiting only split fees is unsupported. In its 2001 Statement of Policy, HUD explained that the "rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text . . . HUD believes that the actual text of the rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one

For at least a decade, HUD has construed this regulation to prohibit all unearned fees, whether split or not. *See, e.g.*, Statement of Policy, 66 Fed. Reg. 53,052, 53,053 (Oct. 18, 2001) ("Since RESPA was enacted, HUD has consistently interpreted Section [2607(b)] and HUD's REPSA regulations to prohibit settlement service providers from charging unearned fees . . . ."); *id.* at 53,057 ("HUD guidance and regulations have consistently interpreted Section [2607] as prohibiting all unearned fees."); *id.* at 53,058 (explaining that the "regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute"); *see also supra* n. 7 (amicus briefs expressing same interpretation of the regulations). That interpretation of the regulation is entitled to deference unless "plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (alteration in original). In this case, the agency's interpretation of its regulation is both long-standing and eminently reasonable.

By its terms, the regulation makes clear that all unearned fees, even if charged and kept by a single provider, violate the statute. The regulation thus states that a single person, acting alone, may run afoul of the provision. *See* 24 C.F.R. § 3500.14(c) ("A

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settlement service provider is involved." 66 Fed. Reg. 53,052, 53,057 n.4 (Oct. 18, 2001).

charge by *a person* for which no or nominal services are performed" violates the statute) (emphasis added). And it makes clear, without qualification, that charging an unearned fee constitutes a full and completed violation. *Id.* ("A charge by a person for which no or nominal services are performed . . . *violates this section.*") (emphasis added). The regulation does not so much as hint that there is an additional requirement that the fee be shared in order to violate the statute and the regulation.

The final sentence of the regulation confirms this reading, providing that the statute is violated by "an arrangement wherein the purchaser of services splits the fee" between two providers. 24 C.F.R. 3500.14(c). Under the Fifth Circuit's construction, the statute would not be violated in such circumstances because neither provider would share the fee it received from the consumer with anyone else. Yet, the regulation makes perfectly clear that even in the absence of a split, the statute is violated.

Another provision, later in the regulation, makes the same point. In addressing fees for multiple services, the regulation explains that "to receive compensation as a title agent, the attorney must perform core title agent services . . . separate from attorney services," 24 C.F.R. § 3500.14(g)(3). By giving an example in which a single person violates the statute simply by charging an unearned fee, without any suggestion that the fee was split with another provider, the regulation confirms HUD's view that the statute is not limited to kickbacks.

B. HUD's 2001 Statement Of Policy Also Merits *Chevron* Deference.

Even apart from the regulations, the 2001 Statement of Policy unambiguously establishes HUD's interpretation of Section 2607(b) as extending to all unearned fees, and that interpretation independently warrants *Chevron* deference.

1. The Fifth Circuit did not dispute that the Statement of Policy unequivocally construes RESPA to prohibit charging unearned fees even if they are not split with another provider. Nor could it. In the Statement, HUD straightforwardly explained that it "specifically interprets [Section 2607(b)] as not being limited to a situation where at least two persons split or share an unearned fee." 66 Fed. Reg. at 53,057.

Instead, the court of appeals held that the Statement of Policy was ineligible for *Chevron* deference because it "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process." Pet. App. 13a. In the panel's view, "interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* 12a-13a (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). That conclusion was in error.

This Court has repeatedly rejected the suggestion that notice and comment is a prerequisite for *Chevron* deference. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (noting that, to the extent *Christensen* "suggested an absolute rule" that agency interpretations reached "through means less formal than 'notice and comment'" do not qualify for

Chevron deference, *Mead* "denied the suggestion"); *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) ("[T]he want of" notice-and-comment procedure "does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) ("[D]eference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment rulemaking power."). Indeed, this Court has given authoritative weight to agency interpretations embodied in formats even less formal than the Statement of Policy at issue here. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (deferring to Pension Benefit Guaranty Corporation's decision to restore pension benefit plan); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986) (deferring to interpretation reflected in agency's longstanding practice, but not set forth in any regulation); *cf. also Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (Scalia, J., dissenting) (urging deference to an interpretive rule promulgated by the Attorney General).

Neither *Christensen* nor *Mead* purported to overrule these decisions. To the contrary, in *Mead* itself, this Court reaffirmed a prior decision in which it deferred to a letter to a private party from a Senior Deputy Comptroller of the Currency. *See Mead*, 533 U.S. at 231, 252 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)).

2. Rather than asking simply whether an interpretation is the product of notice-and-comment rulemaking, this Court considers "a variety of indicators that Congress would expect *Chevron*

deference." *Mead*, 533 U.S. at 237. "[T]he ultimate question," the Court has explained, is "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (emphasis omitted). For a number of reasons, HUD's Statement of Policy is entitled to *Chevron* deference under *Mead*.[23]

First, HUD's Statement of Policy "assumes a form expressly provided for by Congress." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). In conferring lawmaking authority on the agency, Congress gave HUD the option to construe the statute through "regulations" *or* through "such interpretations . . . as may be necessary to achieve the purposes of" the statute. 12 U.S.C. § 2617(a). Nothing in the text of the provision distinguishes between thsee modes of interpretation or otherwise suggests that Congress intended to give HUD's interpretations the force of law only if set forth in a regulation.

Second, HUD expressly exercised that gap-filling authority when it issued the Statement of Policy. *See* 66 Fed. Reg. 53,052 (explaining that HUD was "issuing this Statement of Policy . . . as a formal pronouncement of its interpretation of relevant

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[23] As it unquestionably represents the authoritative interpretation of the agency, the Statement of Policy also merits deference under the Court's pre-*Mead* standard. *See Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting).

statutory and regulatory provisions," pursuant to its power "to prescribe such rules and regulations [and] to make such interpretations * * * as may be necessary to achieve the purposes of [RESPA]") (quoting 12 U.S.C. § 2617(a)); *see also* 24 C.F.R. § 3500.4(a).

Third, Congress encouraged the public to rely on HUD's interpretations as having the force of law, whether expressed through regulations or interpretations like the 2001 Statement of Policy. RESPA's safe harbor provision shields providers from liability for any act done "in conformity with any rule, regulation, *or interpretation*" issued by the agency. 12 U.S.C. § 2617(b) (emphasis added). That Congress protected providers from liability for relying on an agency interpretation, as well as agency regulations, strongly suggests that Congress intended both forms of interpretation to be authoritative.

Fourth, though not issued through notice and comment, HUD's Statement of Policy was developed through a formal and deliberative process. *See Mead*, 533 U.S. at 228. In contrast to the ruling letter in *Mead*, which was one among thousands churned out by low-level bureaucrats in more than forty Customs offices, *id.* at 233, HUD's Statement of Policy was issued in the name of the Secretary of Labor who accordingly took political responsibility for its content. *See, e.g.*, 66 Fed. Reg. at 53,058 ("The Secretary, charged by statute with interpreting RESPA, interprets Section [2607(b)] to mean that two persons are not required for the provision to be violated."). Moreover, the Statement was developed by the Assistant Secretary for Housing (also known as the Federal Housing Commissioner), the third-

ranking,[24] Senate-confirmed official[25] in the agency in charge of RESPA's implementation. *Id.* at 53,052. And as required by HUD regulations governing the exercise of its interpretive authority, 24 C.F.R. § 3500.4(a)(ii), HUD published the Statement of Policy in the Federal Register, where it has been available for public inspection and review for more than a decade. *See* 66 Fed. Reg. 53,052.

The Statement also reflects the agency's careful contemplation of the various competing interpretations and policy considerations underlying the proper construction of the statute. The agency explained that it was issuing the Statement "as a result of questions raised by" *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (2001). 66 Fed. Reg. at 53,052. The Statement took in account the Seventh Circuit's rationale for deciding that RESPA prohibits only kickbacks, *id.* at 53,058, but ultimately concluded that the court's interpretation was not compelled by the text, *id.* 53,058-059, and is "contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges," *id.* at 53,058. The agency explained that although the statute establishes important disclosure requirements, effective protection against unearned fees is a

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[24] Exec. Order No. 13,243, 66 Fed. Reg. 66,262 (Dec. 18, 2001).

[25] 42 U.S.C. § 3533(a)-(b).

necessary supplement to the Act's disclosure provisions. *Id.* at 53,057.[26]

Fifth, the agency had previously taken the same position in a prior notice-and-comment proceeding. In 1996, HUD explained in a preamble to a final notice-and-comment rulemaking that the premise of some comments – "that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another" – misconstrued the unearned fee provision. 61 Fed. Reg. 29,238, 29,249 (June 7, 1996).[27] "The Secretary, charged by statute with interpreting RESPA, interprets [Section 2607(b)] to mean that two persons are not required for the provision to be violated." *Id.* The Secretary acknowledged that some cases held to the contrary, but found "their reasoning not to be persuasive," given that the "statute and the legislative history make it clear that no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed." *Id.* Restricting Section 2607(b) to split

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[26] In light of the Statement's lengthy and thoughtful analysis, the Fifth Circuit was simply wrong to assert that the agency had failed to identify "any clear methodology by which it reached its conclusion." Pet. App. 13a.

[27] In 1992, HUD had amended Regulation X to exempt from scrutiny under Section 2607 charges for use of computer systems that allowed borrowers to compare loans. *See* 59 Fed. Reg. 37,360, 37,361 (July 21, 1994). Two years later, the agency proposed to narrow this exemption to only "qualified" computer systems. *Id.* at 37,368. In response, some commenters questioned whether HUD had authority to regulate payments for the use of *any* computer system, given that the computer fee generall was not split. 61 Fed. Reg. 29at 29,249.

fees, the Secretary concluded, was "an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers." *Id.*

Sixth, HUD possesses considerable specialized expertise regarding the settlement service industry. *See Mead* 533 U.S. at 228. Indeed, RESPA was enacted in large part in response to a study Congress had asked HUD and the Veterans Administration to undertake, in recognition of those agencies' housing market expertise. *See* Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 462 (1970). And HUD was later given interpretative authority over the Act in large part at the request of the settlement services industry, which explained that HUD "is in the business [and] understands our questions."[28]

Seventh, the interpretation in HUD's Statement of Policy is one of "longstanding duration." *Barnhart*, 535 U.S. at 220 (quotation marks omitted). HUD first construed the statute to prohibit all unearned fees in a consumer information booklet in 1976. 41 Fed. Reg. at 20,289. It repeated that understanding in its amendments to Regulation X in 1992, 24 C.F.R. § 3500.14(c), and in the preamble to further regulatory amendments in 1996, 61 Fed. Reg. at 29,249. Over the past decade, it has consistently repeated and defended that position in amicus briefs

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[28] *Real Estate Settlement Procedures Act of 1974: Hearings on H.R. 5352, S. 2327, and H.R. 10283 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Currency & Hous.*, 94th Cong. 327 (1975) (statement of James D. Rowe, Mortgage Bankers Association of America).

filed in numerous courts, including most recently in this case. *Supra* n. 7.

Finally, Congress has acquiesced to HUD's interpretation by electing not to alter Section 2607(b) during the thirty-five years in which HUD has repeatedly articulated and enforced its view of the statute. *See Barnhart*, 535 U.S. at 220. In addition to its regulations, Statement of Policy, and other public pronouncements noted above, HUD has directly reported to Congress its view that the provisions of Section 2607(b) apply "where one settlement service provider . . . accepts any portion of a charge other than for services actually performed."[29] HUD has likewise reported to Congress its enforcement actions against other lenders accused to be engaging in precisely the same conduct as Quicken in this case.[30] Nonetheless, although Congress has amended Section 2607 five times – including, on one occasion, to forestall the

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[29] BD. OF GOVERNORS OF THE FED. RESERVE SYS. & DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO CONG. CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 29 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

[30] *See* U.S. DEP'T OF HOUSING & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2008 THROUGH SEPTEMBER 30, 2008, 12-13, *available at* http://www.hudoig.gov/pdf/sar/sar60.pdf (reporting on enforcement actions against lenders who charged loan discount points without providing any loan discount); U.S. DEP'T OF HOUSING & URBAN DEV. OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2005 THROUGH SEPTEMBER 30, 2005, 14, *available at* http://www.hudoig.gov/pdf/sar/sar54.pdf (same).

effective date of another subsection of the same regulation that governs unearned fees[31] – it has never altered HUD's interpretation of Section 2607(b).[32] Such "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quotation marks omitted).

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[31] Pub. L. No. 104-208, tit. II, § 2103(f), 110 Stat. 3009-401 (1996).

[32] Pub. L. No. 98-181, tit. I, ch. I, § 461(b), (c), 97 Stat. 1231 (1983); Pub. L. No. 100-242, tit.V, § 570(g), 101 Stat. 1950 (1988); Pub. L. No. 102-54, § 13(d)(4), 105 Stat. 275 (1991); Pub. L. No. 104-208, tit. II, § 2103(c)(2), (d), 110 Stat. 3009-400 (1996); Pub. L. No. 111-203, tit. X, subtit. H, § 1098(6), (7), 124 Stat. 2104 (2010).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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STATUTORY APPENDIX

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APPENDIX A

Real Estate Settlement Procedures Act

The Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, *as amended and codified at* 12 U.S.C. § 2601 et seq., *provides in relevant part:*

§ 1 [12 U.S.C. § 2601]. FINDINGS AND PURPOSE.

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this Act to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

§ 5 [12 U.S.C. § 2604]. HOME BUYING INFORMATION BOOKLETS.

(a) PREPARATION AND DISTRIBUTION. – The Director of the Bureau of Consumer Financial Protection (hereafter in this section referred to as the 'Director') shall prepare, at least once every 5 years, a booklet to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services. The Director shall prepare the booklet in various languages and cultural styles, as the Director determines to be appropriate, so that the booklet is understandable and accessible to homebuyers of different ethnic and cultural backgrounds. The Director shall distribute such booklets to all lenders that make federally related mortgage loans. The Director shall also distribute to such lenders lists, organized by location, of homeownership counselors certified under section 106(e) of the Housing and Urban Development Act of

1968 (12 U.S.C. 1701x(e)) for use in complying with the requirement under subsection (c) of this section.

(b) CONTENTS. – Each booklet shall be in such form and detail as the Director shall prescribe and, in addition to such other information as the Director may provide, shall include in plain and understandable language the following information:

(1) A description and explanation of the nature and purpose of the costs incident to a real estate settlement or a federally related mortgage loan. The description and explanation shall provide general information about the mortgage process as well as specific information concerning, at a minimum

(A) balloon payments;

(B) prepayment penalties;

(C) the advantages of prepayment; and

(D) the trade-off between closing costs and the interest rate over the life of the loan.

(2) An explanation and sample of the uniform settlement statement required by section 4.

(3) A list and explanation of lending practices, including those prohibited by the Truth in Lending Act or other applicable Federal law, and of other unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

(4) A list and explanation of questions a consumer obtaining a federally related mortgage loan should ask regarding the loan, including whether the consumer will have the ability to repay the loan, whether the consumer sufficiently shopped for the loan, whether the loan terms include prepayment

penalties or balloon payments, and whether the loan will benefit the borrower.

(5) An explanation of the right of rescission as to certain transactions provided by sections 125 and 129 of the Truth in Lending Act.

(6) A brief explanation of the nature of a variable rate mortgage and a reference to the booklet entitled 'Consumer Handbook on Adjustable Rate Mortgages', published by the Director, or to any suitable substitute of such booklet that the Director may subsequently adopt pursuant to such section.

(7) A brief explanation of the nature of a home equity line of credit and a reference to the pamphlet required to be provided under section 127A of the Truth in Lending Act.

(8) Information about homeownership counseling services made available pursuant to section 106(a)(4) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(a)(4)), a recommendation that the consumer use such services, and notification that a list of certified providers of homeownership counseling in the area, and their contact information, is available.

(9) An explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate and the requirements under section 10 of this Act regarding such accounts.

(10) An explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incidental to a real estate settlement.

(11) An explanation of a consumer's responsibilities, liabilities, and obligations in a mortgage transaction.

(12) An explanation of the nature and purpose of real estate appraisals, including the difference between an appraisal and a home inspection.

(13) Notice that the Office of Housing of the Department of Housing and Urban Development has made publicly available a brochure regarding loan fraud and a World Wide Web address and toll-free telephone number for obtaining the brochure.

The booklet prepared pursuant to this section shall take into consideration differences in real estate settlement procedures that may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

(c) Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Bureau. Each lender shall also include with the booklet a reasonably complete or updated list of homeownership counselors who are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) and located in the area of the lender.

(d) Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. The lender shall provide the booklet in the

version that is most appropriate for the person receiving it. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

(e) Booklets may be printed and distributed by lenders if their form and content are approved by the Bureau as meeting the requirements of subsection (b) of this section.

§ 8 [12 U.S.C. § 2607]. PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES.

(a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title

insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, 1 within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 5(c) are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral

who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of section 8(c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

§ 19 [12 U.S.C. § 2617]. AUTHORITY OF BUREAU.

(a) The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act.

(b) No provision of this Act or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c)(1) The Bureau may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this Act, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in

the investigations, the Bureau is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Bureau deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Bureau issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees –

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment –

> **(A)** eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and
>
> **(B)** replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24, shall not take effect before July 31, 1997.

(2) Continuation of prior rule –

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee

payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date –

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

APPENDIX B

Regulation X

Part 3500 of Title 24, Chapter XX of the Code of Federal Regulations, 24 C.F.R. § 3500 et seq., *provides in relevant part:*

§ 3500.4. RELIANCE UPON RULE, REGULATION, OR INTERPRETATION BY HUD.

(a) *Rule, regulation or interpretation.*

(1) For purposes of sections 19 (a) and (b) of RESPA (12 U.S.C. 2617 (a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the Federal Register by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the Federal Register by the Secretary.

(iii) Any other document that is published in the Federal Register by the Secretary and

states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the Federal Register by the Secretary.

(2) A "rule, regulation, or interpretation thereof by the Secretary" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Secretary or any other statement or issuance, whether oral or written, by an officer or representative of the Department of Housing and Urban Development (HUD), letter or memorandum by the Secretary, General Counsel, any Assistant Secretary or other officer or employee of HUD, preamble to a regulation or other issuance of HUD, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion.* In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of HUD staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 3500.3. Such

interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

§ 3500.14. PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) *No split of charges except for actual services performed.* No person shall give and no person shall

accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) *Thing of value.* This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 3500.14 and 3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

(e) *Agreement or understanding.* An agreement or understanding for the referral of business incident to

or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f) *Referral.*

(1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 3500.2, "required use") a particular provider of a settlement service or business incident thereto.

(g) *Fees, salaries, compensation, or other payments.*

(1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for

services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) *Multiple services.* When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) *Recordkeeping.* Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) *Appendix B of this part.* Illustrations in Appendix B of this part demonstrate some of the requirements of this section.

APPENDIX C

HUD Statement of Policy

HUD's Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (2001), provides in relevant part:

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 C.F.R. Part 3500

[Docket No. FR-4714-N-01]

RIN 2502-AH74

Real Estate Settlement Procedures Act Statement of Policy 2001–1: Clarification of Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of Policy 2001-1.

SUMMARY: This Statement of Policy is being issued to eliminate any ambiguity concerning the Department's position with respect to those lender payments to mortgage brokers characterized as yield

spread premiums and to overcharges by settlement service providers as a result of questions raised by two recent court decisions, *Culpepper* v. *Irwin Mortgage Corp.* and *Echevarria* v. *Chicago Title and Trust Co.*, respectively. In issuing this Statement of Policy, the Department clarifies its interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA) in Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers (the 1999 Statement of Policy), and reiterates its long-standing interpretation of Section 8(b)'s prohibitions. *Culpepper v. Irwin Mortgage Corp.* involved the payment of yield spread premiums from lenders to mortgage brokers. *Echevarria v. Chicago Title and Trust Co.* involved the applicability of Section 8(b) to a settlement service provider that overcharged a borrower for the service of another settlement service provider, and then retained the amount of the overcharge.

Today's Statement of Policy reiterates the Department's position that yield spread premiums are not per se legal or illegal, and clarifies the test for the legality of such payments set forth in HUD's 1999 Statement of Policy. As stated there, HUD's position that lender payments to mortgage brokers are not illegal per se does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The legality of yield spread premiums turns on the application of HUD's test in the 1999 Statement of Policy as clarified today.

The Department also reiterates its long-standing position that it may violate Section 8(b) and HUD's implementing regulations: (1) For two or more persons to split a fee for settlement services, any

portion of which is unearned; or (2) for one settlement service provider to mark-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

This Statement of Policy also reiterates the importance of disclosure so that borrowers can choose the best loan for themselves, and it describes disclosures HUD considers best practices. The Secretary is also announcing that he intends to make full use of his regulatory authority to establish clear requirements for disclosure of mortgage broker fees and to improve the settlement process for lenders, mortgage brokers, and consumers.

* * * *

Part C. Section 8(b) Unearned Fees

A. Background

RESPA was enacted in 1974 to provide consumers "greater and more timely information on the nature of the costs of the [real estate] settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices* * *" 12 U.S.C. 2601.

Since RESPA was enacted, HUD has interpreted Section 8(b) as prohibiting any person from giving or accepting any unearned fees, i.e., charges or payments for real estate settlement services other

than for goods or facilities provided or services performed. Payments that are unearned fees for settlement services occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In the first situation, two settlement service providers split or share a fee charged to a consumer and at least part, if not all, of at least one provider's share of the fee is unearned. In the second situation, a settlement service provider charges a fee to a consumer for another provider's services that is higher than the actual price of such services, and keeps the difference without performing any actual, necessary, and distinct services to justify the additional charge. In the third situation, one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider, and for this reason the fee or any portion thereof for which services are not performed is unearned.

HUD regards all of these situations as legally indistinguishable, in that they involve payments for settlement services where all or a portion of the fees

are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated. As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

B. HUD's Guidance and Regulations

HUD guidance and regulations have consistently interpreted Section 8 as prohibiting all unearned fees. In 1976, HUD issued a Settlement Costs Booklet that provided that "[i]t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 FR 20289 (May 17, 1976). Between 1976 and 1992, HUD indicated in informal opinions that unearned fees occur where there are excessive fees charged,

regardless of the number of settlement service providers involved.[3]

In the preamble to HUD's 1992 final rule revising Regulation X (57 FR 49600 (November 2, 1992)), HUD stated: "Section 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992).

HUD's regulations, published on November 2, 1992, implement Section 8(b). Section 3500.14(c)[4] provides:

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[3] *See e.g.*, Old Informal Opinion (6), August 16, 1976 and Old Informal Opinion (65), April 4, 1980; Barron and Berenson, Federal Regulation of Real Estate and Mortgage Lending, (4th Ed.1998). On November 2, 1992 (57 F.R. 49600), when HUD issued revisions to its RESPA regulations, it withdrew all of its informal counsel opinions and staff interpretations issued before that date. The 1992 rule provided, however, that courts and administrative agencies could use HUD's previous opinions to determine the validity of conduct occurring under the previous version of Regulation X. *See* 24 CFR 3500.4(c).

[4] The heading to 24 CFR 3500.14 is titled "Prohibition against kickbacks and unearned fees." However, the heading of subsection (c) is titled "split of charges," and the preamble to the November 1992 rule states "[s]ection 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992). The rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text. As discussed in Section D of this Statement of Policy, HUD believes that the actual text of the

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 CFR 3500.14(g)(2) states in part:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation.

24 CFR 3500.14(g)(3) provides in part:

> When a person in a position to refer settlement service business * * * receives a

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rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one settlement service provider is involved.

> payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.

In Appendix B to the HUD RESPA regulations, HUD provides illustrations of the requirements of RESPA. Comment 3 states in part:

> The payment of a commission or portion of the * * * premium * * * or receipt of a portion of the payment * * * where no substantial services are being performed * * * is a violation of Section 8 of RESPA. It makes no difference whether the payment comes from [the settlement service provider] or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here [the real estate broker in the example] is being compensated for a referral of business to [the title company].

In 1996, in the preamble to the final rule on the Withdrawal of Employer/Employee and Computer Loan Origination Systems Exemptions[5] (61 FR 29238 (June 7, 1996)), HUD reiterated its interpretation of Section 8(b) of RESPA as follows:

> HUD believes that Section 8(b) of the statute and the legislative history make clear that no person is allowed to receive 'any portion' of charges for settlement services, except for

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[5] This final rule was delayed by legislation, but the Department implemented portions of the final rule that were not affected by the legislative delay on November 15, 1996. 61 FR 58472 (November 15, 1996).

> services actually performed. The provisions of Section 8(b) could apply in a number of situations: (1) where one settlement service provider receives an unearned fee from another provider; (2) where one settlement service provider charges the consumer for third-party services and retains an unearned fee from the payment received; or (3) where one settlement service provider accepts a portion of a charge (including 100% of the charge) for other than services actually performed. The interpretation urged [by the commenters to the proposed rule published on July 21, 1994], that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another, is an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers. The Secretary, charged by statute with interpreting RESPA, interprets Section 8(b) to mean that two persons are not required for the provision to be violated. 61 FR 29249.

The latest revision to the Settlement Costs Booklet for consumers, issued in 1997, also provides "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 FR 31998 (June 11, 1997).

Further, HUD has provided information to the public and the mortgage industry in the "Frequently Asked Questions" section of its RESPA Web site,

located at <*http://www.hud.gov/fha/sfh/res/resindus.html*>. Question 25 states:

> Can a lender collect from the borrower an appraisal fee of $200, listing the fee as such on the HUD–1, yet pay an independent appraiser $175 and collect the $25 difference?
>
> The answer reads:
>
> No, the lender may only collect $175 as the actual charge. It is a violation of Section 8(b) for any person to accept a split of a fee where services are not performed.

In 1999, by letter submitted at the request of the Superior Court of California, Los Angeles County, in the case of *Brown v. Washington Mutual Bank* (Case No. BC192874), HUD provided the following response to a specific question posed by the court on lender "markups" of another settlement service provider's fees:

> A lender that purchases third party vendor services for purposes of closing a federally related mortgage loan may not, under RESPA, mark up the third party vendor fees for purposes of making a profit. HUD has consistently advised that where lenders or others charge consumers marked-up prices for services performed by the third party providers without performing additional services, such charges constitute "splits of fees" or "unearned fees" in violation of Section 8(b) of RESPA.

HUD noted in its letter to the court that the response reflected the Department's long-standing position.

C. Recent Cases

Notwithstanding HUD's regulations and other guidance, the Court of Appeals for the Seventh Circuit held, in *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), that Section 8(b) was not violated where a title company, without performing any additional services, charged the plaintiffs more money than was required by the recorder's office to record a deed and the title company then retained the difference. The court reasoned that plaintiffs "failed to plead facts tending to show that Chicago Title illegally shared fees with the Cook County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under [RESPA § 8(b)]." *Id.* at 626. The court in essence concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b).

Earlier, in *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306 (M.D. Ala. 1998), cited by the Seventh Circuit in support of its conclusion, the district court concluded that 24 CFR 3500.14(c), "[w]hen read as a whole," prohibits payments for which no services are performed "only if those payments are split with another party." *Id.* at 1309. The *Willis* court held that there must be a split of a charge between a settlement service provider and a third party to establish a violation Section 8(b). The court also concluded that 24 CFR 3500.14(g)(3) only applied when there was a payment from a lender to a

broker, or vice versa. The payment from a borrower to a mortgage lender could not be the basis for a violation of 24 CFR 3500.14(g)(3) and Section 8(b).

HUD was not a party to the cases and disagrees with these judicial interpretations of Section 8(b) which it regards as inconsistent with HUD's regulations and HUD's long-standing interpretations of Section 8(b).

D. Unearned Fees Under Section 8(b)

This Statement of Policy reaffirms HUD's existing, long-standing interpretation of Section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges. 12 U.S.C. 2601(a).

It is HUD's position that Section 8(b) proscribes the acceptance of any portion or part of a charge other than for services actually performed. Inasmuch as Section 8(b)'s proscription against "any portion, split, or percentage" of an unearned charge for settlement services is written in the disjunctive, the

prohibition is not limited to a split. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person. Simply put, given that Section 8(b) proscribes unearned portions or percentages as well as splits, HUD does not regard the provision as restricting only fee splitting among settlement service providers. Further, since Section 8(b) on its face prohibits the giving or accepting of an unearned fee by any person, and 24 CFR 3500.14(c) speaks of a charge by "a person," it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.[6]

A settlement service provider may not levy an additional charge upon a borrower for another settlement service provider's services without providing additional services that are bona fide and justify the increased charge. Accordingly, a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct services provided to justify the charge. 24 CFR 3500.14(g)(3).[7]

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[6] HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees, because a consumer's intent is to make payment for services, not an unearned fee.

[7] HUD notes that some lenders have charged an additional fee merely for "reviewing" another settlement service provider's services. HUD does not regard such "review" as constituting an

The HUD regulation implementing Section 8(b) states: "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section." 24 CFR 3500.14 (c).

The regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute. 24 CFR 3000.14(c). A single service provider is also prohibited from charging a duplicative fee. Further, a single service provider cannot serve in two capacities, e.g., a title agent and closing attorney, and be paid twice for the same service. The fee the service provider would be receiving in this case is duplicative under 24 CFR 3000.14(c) and not necessary and distinct under 24 CFR 3000.14(g)(3). Clearly, in all of these instances, the source of the payment – whether from consumers, other settlement service providers, or other third parties – is not relevant in determining whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer. See 24 CFR 3500.14(c). Therefore, a single settlement service provider violates Section 8(b) whenever it receives an unearned fee.

A single service provider also may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided. HUD's regulations as noted state: "If the payment of a thing of value bears no relationship to the goods or services provided, then the excess is for

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actual, necessary, or distinct additional service permissible under HUD's regulations.

services or goods actually performed or provided." 24 CFR 3500.14(g)(2). Section 8(c)(2) only allows "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed," i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2).

The Secretary, therefore, interprets Section 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

* * * *

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-1042

IN THE
Supreme Court of the United States

TAMMY FORET FREEMAN, *et al.*,
Petitioners,

v.

QUICKEN LOANS INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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January 3, 2012

QUESTION PRESENTED

Section 8(b) of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(b), provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

The question presented is whether this provision applies to a settlement service provider who acts alone and charges a fee for which allegedly no services are performed.

RULE 29.6 DISCLOSURE STATEMENT

Quicken Loans Inc. is owned by Rock Holdings Inc. Neither Quicken Loans Inc. nor Rock Holdings Inc. is a publicly-held corporation, and no publicly-held corporation owns ten percent or more of either of their stock.

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STATEMENT OF THE CASE

A. The Statutory Context.

Consumer protection statutes usually strike a balance. How Congress strikes that balance depends on the ill, the range of potential cures and their merits, policy and political concerns, and the era. Petitioners in this case seek to upset the balance Congress struck in the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617 ("RESPA").

Enacting RESPA in 1974, Congress created a framework for the regulation of the residential mortgage business with a central goal of ensuring that settlement costs are fairly disclosed to the consumer. See, *e.g.*, 12 U.S.C. §§ 2601(b)(1) (disclosure is the statute's first listed purpose), 2603 (requiring uniform settlement statements disclosing all charges), 2604(a) (requiring publication of a federal special information booklet), 2604(c) (requiring good faith estimate of closing costs). In many respects this focus on disclosure repeated the approach taken four years earlier in the Truth in Lending Act, 15 U.S.C. §§ 1601–1616; indeed, RESPA required that disclosures under each statute be coordinated. 12 U.S.C. § 2603(a). The rationale for this choice is that informed consumers will understand their proposed closing costs and, if dissatisfied, will take their business elsewhere, thereby encouraging the competitive forces of the market to keep closing costs low.

In addition to its disclosure obligations, RESPA in Section 2607 also outlaws kickbacks and referral fees. These backroom deals between settlement service providers by their nature are not transparent

to the consumer and impede the effectiveness of increased loan cost disclosure.

But in increasing consumer protection, Congress struck a balance. Of particular importance here, Congress did not create a right to sue providers for too-high prices, specifically rejecting the alternative approach of regulating settlement service prices, as had been proposed in competing legislation championed by Senator William Proxmire and in proposed but never implemented regulations. See S. 2288, 93rd Cong. (July 1974); U.S. DEP'T OF HOUSING & URBAN DEV. & VETERAN'S ADMIN., REPORT ON MORTGAGE SETTLEMENT COSTS (Mar. 1972) ("HUD-VA Report"); 37 Fed. Reg. 13,186 (July 4, 1972). Every court of appeals to consider the question has concluded that RESPA does not provide any cause of action against a provider for charging "too much."

In obtaining mortgage loans from Quicken Loans, each petitioner agreed to pay a disclosed loan discount fee, as well as certain disclosed closing costs. A loan discount fee, sometimes referred to as "points," is a one-time charge that is part of the lender's pricing made for the loan terms the borrower requests, and typically reduces the loan's interest rate below what the borrower otherwise would have been charged. Petitioners asserted in their complaints that the agreed-upon loan discount fees were entirely "unearned," allegedly because they did not receive the "service" of a lower interest rate. Quicken Loans did not charge any unearned fees as alleged, but the District Court did not reach that issue because it entered summary judgment for Quicken Loans on another ground.

B. Proceedings Below.

Petitioners, three married couples, obtained residential mortgage loans from Quicken Loans in unrelated transactions in early 2007. Joint Appendix ("JA") 8, 27, 78. Quicken Loans was, and is, one of the country's largest non-bank residential mortgage lenders operating nationwide. Varying in amounts between $88,000 and $177,650, the loans each carried interest rates that were fixed for thirty years. JA 62–63 (& Exhs. A, G), 103 (& Exh. A).

Mortgage loans are a differentiated product: loans can contain varying features and terms, including the loan's interest rate and repayment schedule, and there are different types and amounts of closing costs associated with any loan, such as charges for loan origination and title examination. Shortly after applying, each petitioner received a number of specific disclosures describing each of these aspects of the requested loans. One of the charges disclosed at that time, and which was ultimately charged after the loan was approved and processed, was a "loan discount fee."

Loan discount fees are a component, along with the interest rate, of the price of the loan. As HUD itself has described in the consumer handbook RESPA requires, the payment of a loan discount fee typically results in some lowering of the promissory note rate that a borrower otherwise would have paid. HUD, *Shopping For Your Home Loan, HUD's Settlement Cost Booklet*, at 41, 75 Fed. Reg. 423-01 (2010). See also HUD, *Buying Your Home: Settlement Costs and Helpful Information*, at 15 (1997); HUD and other agencies, *Looking for the Best*

Mortgage? Shop, Compare, Negotiate, at 2 (undated).[1] The fee thus enables borrowers to trade off higher up-front costs in favor of a lower monthly payment. Consistent with that usage, loan discount fees usually are tax deductible in the same manner as post-closing mortgage interest is deductible. INTERNAL REVENUE SERV., *Home Mortgage Interest Deduction*, IRS Publication 936, at 5–7 (Dec. 5, 2011).

Loan discount fees are common. Sometimes the payment is used to give the borrower an unusually low rate, what might colloquially be referred to as below "par" or "market." Other times, such as where the borrower's credit history or a desired loan term presents somewhat higher risk to the lender and so would require a higher interest rate, points may reduce the price but only so that the interest rate is closer to "par" or "market." The federal government has accommodated the payment of loan discount fees in a number of ways: HUD's regulations and guidance documents have instructed lenders how to use them and disclose them, HUD's official HUD-1 settlement forms allow them to be charged, and various federal agency consumer handbooks (including HUD handbooks) explain the helpful features of loan discount fees. 24 C.F.R. pt. 3500, App'x A (sample HUD-1 form and written guidance on disclosing points in Line 802); 24 C.F.R. § 201.2;

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[1] Available at, respectively, (i) http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12892.doc (last visited January 2, 2012), and (ii) www.hud.gov/buying/booklet.pdf. (last visited January 2, 2012).

HUD Mortgagee Letter 94-16; HUD and other agencies, *Looking For the Best Mortgage? Shop, Compare, Negotiate*, at 3; HUD, *Buying Your Home: Settlement Costs and Helpful Information*, at 6, 14–15; HUD, *Shopping For Your Home Loan, HUD's Settlement Cost Booklet*, at 41, 75 Fed. Reg. 423-01; FEDERAL RESERVE BOARD, *Consumer Handbook on Adjustable Rate Mortgages*, at 19, A5, 71 Fed. Reg. 78,437 (2009).

Consistent with RESPA, in each of the three loans here, the loan discount fee was disclosed on the Good Faith Estimate provided to and signed by the petitioners far in advance of closing. JA 62, 63–64 (& Exhs. D, J) (Freeman Estimate signed 20 days before closing and Bennett Estimate signed 13 days before closing); JA 103 (& Exh. D) (Smith Estimate signed 53 days before closing). The estimated fees were presented as a percentage of the loan amount that exactly matched what each petitioner ultimately was charged. *Id.*

At closing, the Freeman and Bennett petitioners' HUD-1s (the federally mandated settlement forms) disclosed a "loan discount fee" charged by Quicken Loans. Petition Appendix ("Pet. App.") 2a; JA 66–72 (reproducing both HUD-1 statements). The Smith petitioners' HUD-1 disclosed a "loan origination fee" which a Quicken Loans manager testified (without contradiction) had been mischaracterized by the settlement company because the charge actually was a loan discount fee. Pet. App. 22a n.4; JA 106–111

(reproducing HUD-1 statement). See also JA 103 (explaining settlement company's error).[2]

Months after the loans closed, petitioners sued Quicken Loans in separate lawsuits in Louisiana state court for alleged violations of Section 2607(b).[3] They each claimed that Quicken Loans had imposed certain charges on them without performing any settlement services in return and hence had accepted fees that were "unearned." JA 8–9, 28, 78–80. Petitioners did not claim that any of the loan discount fees were divided or shared among multiple providers. *Id.* Petitioners also did not claim that the overall charges or rates on the loans had not been disclosed to them or were unreasonable. *Id.* 7–13, 26–37, 77–83.

Petitioners rested their claim on the section of RESPA which provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in

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[2] Petitioners and the United States do not refute the point in this Court, and refer to all three couples as having been charged loan discount fees. Brief for Petitioners ("Pet. Br.") 16, 21; Brief for the United States ("U.S. Br.") 28-32. Even if the loan discount fees in this case were for loan origination, in whole or in part, the question presented should yield the same answer, so neither the parties nor the Fifth Circuit found the factual distinction involving the Smiths' loan necessary to discuss.

[3] The suits contained other causes of action under state law, and challenged another fee, but those claims and that fee are not at issue in this Court. Pet. Br. i.

connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b). In suing under that Section petitioners also relied on the Department of Housing and Urban Development's interpretation of the Section as prohibiting unearned fees even when the conduct is unilateral and the fee is not shared or divided. "Real Estate Settlement Procedures Act Statement of Policy 2001-1," 66 Fed. Reg. 53,052 (Oct. 18, 2001)(portions reproduced at Pet. App. 71a-83a).[4]

Quicken Loans removed the cases to District Court, where they were consolidated, and it then moved for summary judgment. Its main argument was that RESPA does not address the allegedly unearned loan discount fees because the statute only reaches conduct involving the sharing or division of charges among two or more settlement service providers, and Quicken Loans did not share the loan discount fees with anyone. JA 54–55, 96–97.

Quicken Loans also proved by affidavit, as an alternative ground for judgment, that the loan discount fee in each instance was not "unearned" at all, because the fee was a component of the price for the loan terms the petitioners had selected. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11). Petitioners conceded that the fees were part of the pricing. JA 74 (¶ 5), 75 (¶

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[4] HUD's regulatory authority over Section 2607(b) has recently been reassigned to the Consumer Financial Protection Bureau. Pub. L. No. 111–203, § 1061(b)(7), 124 Stat. 2038, 2039–40 (2010). For ease of discussion, as the other parties have, we refer consistently to HUD rather than to the Bureau.

3), and 113 (¶ 7). In response to the motion, petitioners offered no affidavit explanation why they were claiming that the fees were entirely unearned (though they did cite to documents, with no explanation as to how those materials supported their lawsuit). *Id.* None of the petitioners even attempted to allege or prove that they had asked Quicken Loans for a reduced interest rate that had not been provided. See JA 8 (¶ 5), 28 (¶ 6), and 77–83.

The District Court granted summary judgment on the ground that Section 2607(b) only addresses the sharing or division of a settlement service charge, and does not regulate a lender's charges that it retains. Pet. App. 19a. Because it was undisputed that none of the loan discount fees had been divided with a portion of the fee given to another who had not earned it, the Court did not need to address whether Quicken Loans itself had earned the fees.

The Fifth Circuit affirmed, holding "that the language of [the Section] is unambiguous and does not cover undivided unearned fees." Pet App. 6a, 7a. In so holding, the Court of Appeals joined the conclusion of three other courts of appeal which have construed the statute identically. *Id.* 6a. The Court of Appeals gave four reasons for its conclusion.

First, the Fifth Circuit explained that the language "[n]o person shall give and no person shall accept" unambiguously does not reach a sole actor's undivided fees because the statute's use of the conjunction "and" shows that Congress intended to reach "two parties each committing an act" punishable under the statute: one party giving and

another party receiving a "portion, split, or percentage" of the fee at issue. Pet. App. 7a.

Second, the Fifth Circuit ruled that, because Section 2607(a) and Section 2607(b) both begin with identical words—"No person shall give and no person shall accept"—and because Section 2607(a), which forbids kickbacks, clearly requires two culpable parties, the identically-worded Section 2607(b) also should be construed to require two culpable actors. Pet. App. 8a.

Third, the Fifth Circuit concluded that Section 2607(b)'s language "any portion, split, or percentage" "requires that two parties share something" less than the whole. Pet App. 8a.

And fourth, the Fifth Circuit ruled that, "read in its entirely, RESPA is an anti-kickback statute, not an anti-price gouging statute." Pet. App. 10a.

Having found Section 2607(b) to be unambiguous, the Court of Appeals rejected petitioners' argument that it should follow HUD's contrary interpretation in its 2001 Policy Statement. The Court of Appeals held that, "[w]hen the statutory provision is clear on its face, there is no need to look to any regulatory interpretation, such as the HUD 2001 statement." Pet. App. 12a. The Fifth Circuit also ruled that the HUD Policy Statement was not entitled to deference in any event because its informal adoption deprived it of the force of law and did "'not warrant *Chevron*-style deference'" and because the Statement "provides no concrete reasoning for its conclusion." *Id.* 13a. Judge Higginbotham dissented. Although he agreed with the majority that the Policy Statement was not entitled to *Chevron* deference, he

concluded that Section 2607(b) should be read to prohibit unearned undivided fees in order to promote "a core objective of RESPA: promoting transparency of costs associated with settlement." *Id.* 17a.

SUMMARY OF ARGUMENT

RESPA Section 2607(b) has a plain meaning that is revealed by the words Congress used and the statute in which the provision appears: it prohibits the sharing or division of a real estate settlement service fee between two providers where the shared portion of the fee is not earned by the recipient. It does not address situations where a borrower claims she was charged a fee that she believes was not earned by the lender and the lender retains that fee.

The plain language of the statute compels this conclusion in a number of different ways.

The law begins with the phrase "No person shall give and no person shall accept," which the Fifth Circuit and three other circuit courts of appeal have all concluded contemplates conduct by two culpable actors. This conclusion is bolstered by RESPA's use in Section 2607(a) of the same formulation in defining the conduct of intentional kickbacks.

The limitation in Section 2607(b) to the giving or accepting of "any portion, split, or percentage of a charge" other than "for services actually performed" also supports the conclusion that this is a fee splitting statute, not an unearned fee statute. The collective concept of a "portion, split, or percentage" connotes the sharing or division of something (here, a charge "made or received"). The natural reading of the words—alone, together, and in context—is that

they describe something less than the entirety. Quicken Loans' conduct in charging a loan discount fee as part of its price and retaining that fee cannot reasonably be said to have involved apportioning, splitting or accepting a percentage of the fee.

Section 2607(b) further underscores its narrow focus on backroom deals by describing two separate transactions that each must be met before the law is potentially implicated. First, there must be a "charge made or received for a real estate settlement service." Then, someone must "give" and someone must "accept" "any portion split, or percentage" of that charge. That the law must be read this way is compelled by its structure and by the verbs Congress chose, the former plainly directed at the imposition of charges and the latter at a voluntary transaction with respect to the charges already received.

Statutory context also points solely to the Fifth Circuit's proper construction. RESPA's findings and purposes refers to "referral fees" and a desire to outlaw only "certain" practices, without mentioning or implying that unearned fees generally are addressed. Indeed, Congress in enacting the law expressly commissioned HUD to study the settlement service business more closely and report back as to "the necessity for further legislation."

Legislative history further points towards the conclusion that the only conduct being targeted by Congress in 1974 was the division or sharing of a fee among culpable providers where the shared amount is unearned. In particular, the authoritative committee reports, as well as statements of sponsors and the background against which Congress

legislated, confirm the limited reach of Section 2607(b).

Even if this Court were to find Section 2607(b) to be ambiguous, it still should be construed only to reach the division or sharing of a charge between two providers. That is not only the construction which finds the most persuasive and widest support in the language, context and legislative history, but, since RESPA Section 2607(b) is a criminal statute, the rule of lenity should operate to limit the law's reach to that which it clearly encompasses, and no more.

Petitioners and the United States urge that Section 2607(b) is ambiguous and so HUD's contrary view of the Section's reach should be given deference. As an initial matter, the regulation they cite, 24 C.F.R. § 3500.14(c), actually supports the Fifth Circuit's interpretation by its plain terms; their suggestion that this rule instead contains a freestanding prohibition on unearned fees is not consistent with the language or with the regulatory history. While HUD's 2001 Policy Statement, unlike the regulation, is clear in embracing petitioners' position, the Statement is not due *Chevron* deference from this Court, as all three members of the Fifth Circuit panel concluded. The Statement is an interpretation only, not a policy judgment or rule intended to have the force of law. The Court should not defer in any fashion to the Statement, as it provides no reasoned explanation for its conclusion and otherwise lacks the power to persuade.

ARGUMENT

I.

SECTION 2607(b) UNAMBIGUOUSLY REACHES ONLY DIVIDED CHARGES.

A. The Plain Language Of Section 2607(b) Reaches Only Transactions Between Two Or More Providers Involving An Unearned Fee.

Four circuit courts of appeal—the Fourth, Fifth, Seventh, and Eighth—have held that Section 2607(b) only covers cases in which one settlement service provider shares a part of a settlement service charge with another settlement service provider that did nothing to earn that part. These courts have all rejected the argument that a settlement service provider might unilaterally violate Section 2607(b) by charging a borrower an allegedly unearned amount and then retaining the entire amount as part of its compensation. That plain-meaning interpretation of the statute is plainly correct.

1. As the Fifth Circuit recognized, the plain meaning of Section 2607(b)'s opening words—"No person shall give and no person shall accept"—contemplates the actions of two culpable actors, one giving something and the other accepting that thing. The conjunctive "and" typically requires both linked conditions to occur. Pet. App. 7a. Otherwise, there would be no difference reflected in the choice to use

that word rather than "or." Indeed, if Congress had meant to impose civil and criminal penalties for unilateral conduct by a lender in accepting unearned fees from borrowers, the natural way to have done so would have been simply to say that "no person shall give or accept" any compensation for unearned services.[5] Even the United States concedes that, "because someone who 'accepts' money typically accepts it *from* someone else, a violation of Section 2607(b) will ordinarily involve a 'transaction' rather than a purely 'unilateral act.'" U.S. Br. 14; see also *id.* 9 ("[V]iolations of Section 2607(b) typically involve transactions between two (or more) persons rather than wholly unilateral conduct * * * .").[6]

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[5] A number of states with statutes like Section 2607(b) have chosen precisely that formulation, and not Congress'. See *e.g.*, MONT. CODE ANN. § 33-25-401(1) ("a person may not * * * give or accept a portion, split or percentage"); N.Y. BANKING LAW §6-m(2)(l) ("no lender, mortgage banker or mortgage broker shall accept or give any fee, kickback, thing of value, portion, split, or percentage of charges"); TEX. INS. CODE ANN. § 2502.052 ("a person may not give or accept any portion, split or percentage of a charge.").

[6] The United States argues that Section 2607(b) should not be read to require two culpable actors because a similarly worded criminal statute—"no person may purchase and no person may sell heroin"—therefore would cover someone who sold heroin to an undercover law enforcement officer "even though the [purchasing] agent himself would not be a culpable party." U.S. Br. 14–15. But the agent in that example *would* be culpable, though he would be immune under an applicable law enforcement exception. 21 U.S.C. § 885(d). In any event, construing the statute as petitioners advocate would not avoid

2. Congress's use of the phrase "portion, split, or percentage" also demonstrates that Section 2607(b) does not reach a provider's full retention of charges paid by the consumer. Those three words connote the disposition of an amount less than the full charge. "Split" undeniably does so, as all here agree. Pet. Br. 19; U.S. Br. 17. So too with "portion" and "percentage." See WEBSTER'S THIRD NEW INT'L DICTIONARY, 1768 (1993) (defining "portion" as "an individual's part or share of something"); *id.* at 1675 (defining "percentage" as "a part of a whole expressed in hundredths").

Read as a whole, the phrase "any portion, split, or percentage" naturally refers to parts of a charge, not the entire amount. Every circuit court to consider this phrase agrees. See *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111, 117 (2d Cir. 2007) (the words "are commonly understood to reference things that have been divided and that are less than a whole"); *Boulware* v. *Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002) ("by using th[is] language * * * Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge"); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (relying on same phrase to conclude statute was not implicated where "[n]o one agreed to divide a receipt with [the provider]"); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (statute "prohibits only transactions in which the

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the even–more surprising result that petitioners themselves would be liable in this case.

defendant shares a 'portion, split, or percentage of any charge' with a third party").

Attempting to create ambiguity where none exists, petitioners wrongly contend that all conduct in dividing a fee is "fully encompassed in 'split' alone." Pet. Br. 19. But the choice of these three words rather than one makes sense in the context of what a provider might do with a "charge made or received for the rendering of a real estate settlement service." A "split" most naturally describes an even division. *Krzalic*, 314 F.3d at 879. "Percentage" addresses uneven divisions, like a commission or an amount off the top. And "portion" picks up the remaining situations where a provider gives away a component of the whole charge, such as a flat dollar amount of the entire fee.

If Congress had intended to reach unilateral action by a lender in accepting the entirety of a fee, it would have said simply "any or all," which is the obvious expression of such an intent. See, *e.g.*, 12 U.S.C. § 1755 ("Board may waive payment of any or all other charges"); 25 U.S.C. § 640d-7 ("Secretary of the Interior is authorized to pay any or all appropriate legal fees"). And it would not have joined the words "portion" and "percentage" with the word "split," the latter of which cannot be tortured into meaning an entire amount.

The traditional canon of construction, *noscitur a sociis*, further reinforces this conclusion. That canon "dictates that words grouped in a list should be given related meaning." *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990) (internal quotations and citations omitted).

It applies most forcefully where, as here, the list is made up of terms with a "comparable core of meaning" that are stated in conjunctive (or not entirely disjunctive) terms. *Graham County Soil and Water Conservation Dist.* v. *United States*, 130 S. Ct. 1396, 1403 (2010). The United States contends that the three words "are not so similar that they should be construed in a way that deprives any individual term of its common meaning." U.S. Br. 10. But this argument ignores the common sense meaning of the words. Even if "portion" and "percentage" may in unusual or highly stylized circumstances refer to the entirety of a thing, the ordinary use of both words is to express a part of something larger. These three words do share a "comparable core of meaning" that requires them to be read together, as referring to a part of the whole.

3. Congress' choice to make both givers and acceptors liable makes sense only if fee-splitting arrangements are the statutory object, for otherwise consumers themselves would be liable for "giv[ing]" the unearned fee to their lender or a service provider. Both the Fourth and Seventh Circuits noted this anomaly in petitioners' interpretation of the statute. See *Krzalic*, 314 F.3d at 879 (Posner, J.) ("On the plaintiffs' understanding, they themselves violated the statute because they gave Republic a portion of the fee charged by the county recorder!"); *Boulware*, 291 F.3d at 265 (finding this interpretation to be "irrational" and "perverse"). Congress could not have intended such an absurd result. RESPA's private right of action authorizes the "person or persons charged for the settlement services" to recover

against the "person or persons who violate" Section 2607(b). As the petitioners recognize (Pet. Br. 21 n.16), it would make little sense for a consumer to be liable to herself. There is no anomaly, however, if Section 2607(b) is correctly construed to cover only transactions among settlement service providers.[7]

4. The conclusion that the statute creates liability only when there is a sharing or division of a fee among two culpable providers, a portion of which is unearned, and that it does not apply to a situation where the consumer is the giver of an undivided fee, is further reinforced by the structure of Section 2607(b).

Section 2607(b) identifies two distinct transactions. First, there must be a "charge made or received for the rendering of a real estate settlement service." This is the money paid by the consumer, consistent with Congress' repeated use of the word "charge" to refer to the fees that consumers pay for services. See, *e.g.*, 12 U.S.C. §§ 2601(a), 2603(a),

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[7] It is no answer to this difficulty to say, as petitioners do, that consumers would not be liable for other reasons. Pet. Br. 21 n.16. They first adopt the assertion in the Eleventh Circuit's *Sosa* decision that the consumer is not liable because she always intends to pay for the services but the statute does not provide such an exemption. *Sosa* v. *Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Petitioners also claim that their reading is appropriate because consumers could not be civilly liable, since civil recoveries are paid to the person "charged for the settlement service." But it remains that, if consumers can be givers under Section 2607(b), they would be subject to criminal liability. 12 U.S.C. § 2607(d)(1).

2604(c). Once a charge is made or received, someone then must "give" and someone must "accept" "any portion, split, or percentage" of that charge. Liability attaches only to this second transaction, based on whether it is earned.

That there are two transactions contemplated by the Section, and that only the subsequent transaction can give rise to liability, is evident from the different verbs Congress employed: "make" and "receive" juxtaposed with "give" and "accept." Congress would not have used "two distinctly different forms of words for the same purpose," *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999)—particularly not within a single sentence, *Pillsbury* v. *United Eng'g Co.*, 342 U.S. 197, 199 (1952). In Section 2607(b) and elsewhere, Congress used verbs connoting obligation to describe transactions between consumers and providers. Providers thus "ma[ke]" or "impose" charges upon consumers, 12 U.S.C. §§ 2603(a), 2607(b), 2610, and consumers "pa[y]" or "incur" those charges, *id.* §§ 2604(d), 2607(d)(2). By contrast, the verbs "give" and "accept" signify a wholly voluntary exchange. See WEBSTER'S THIRD NEW INT'L DICTIONARY 959 (2002) ("give" means "to confer the ownership of without receiving a return: make a present of"); *id.* at 10 ("accept" means "to receive with consent (something given or offered)").

This difference in meaning compels the conclusion that Congress did not intend for Section 2607(b) to cover the consumer's payment of an unearned fee to the provider. Consumers do not freely "give" their money to providers; they pay the

necessary charges. On the other hand, it is natural to say that providers engaged in fee splitting are voluntarily "giv[ing]" and "accept[ing]" the money.

That Section 2607(b) speaks of two different transactions also is shown by the verbs' tense. The transaction involving the charge is in the past: the charge has been "made or received." The transaction involving the portion, split, or percentage of the charge is in the future: something no person "shall give" and no person "shall accept." See W. Follett, *Modern American Usage: A Guide* 374-75 (1966) (discussing use of "shall" as referring to future action).

The Fifth Circuit's construction is faithful to this structure, finding liability not on the consumer's payment but instead on what is done with the consumer's payment. Had Congress intended to prohibit all unearned settlement charges, it would have mentioned only the first transaction, between the consumer and the providers and would have said nothing about giving or accepting a part of the charge. Congress might have said, for instance: "No charge shall be made in connection with the settlement other than for services actually performed." Notably, Congress used similar language elsewhere in RESPA when it prohibited certain charges on the consumer. 12 U.S.C. § 2610 ("No fee shall be imposed or charge made upon any other person" for certain mandated disclosures).

But Congress did not do that. Congress chose to regulate the consumer-provider relationship—the making and receiving of the charges—through

RESPA's many disclosure provisions. Section 2607(b) focuses exclusively on what a provider might do with a charge that has already been made: give a portion of the charge to another provider, or accept a portion of the charge from another provider. This second transaction is the only aspect that can be a predicate circumstance to potential liability, and that transaction does not involve the consumer at all.

B. The Statutory Context Confirms The Limited Reach Of Section 2607(b).

RESPA's overall structure and its other provisions strongly support the conclusion that Section 2607(b) does not reach undivided fees. See *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (statutory interpretation "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'") (citation omitted).

1. Section 2607(b)'s closest neighbor, the anti-kickback provision in Section 2607(a), provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement * * * that business incident to or part of a real estate settlement service * * * shall be referred to any person." That provision applies on its face only to joint conduct. As the Fifth Circuit noted, Congress' use of the identical introductory words in Section 2607(b) shows that Congress also meant for that section to apply to the joint conduct of two or more persons, not to unilateral conduct. Pet. App.

8a.[8] *See also Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2010) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations."); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

Petitioners' contention that the Fifth Circuit's reading of Section 2607(b) renders Section 2607(a) "largely surplusage" (Pet. Br. 24) is mistaken. The two provisions are aimed at the same general problem—payments and other arrangements between settlement service providers—but they have different elements and proscribe different conduct. *Boulware*, 291 F.3d at 266. Section 2607(a) prohibits one settlement service provider from accepting any "fee, kickback, or thing of value" from another settlement service provider in exchange for the referral of business "pursuant to an agreement or understanding." Section 2607(b) is both narrower and broader. It is narrower because it reaches only "charges," and therefore would not prohibit the

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[8] The United States argues that the Section 2607(a) phrase "pursuant to any agreement or understanding," not the phrase "No person shall give and no person shall accept," is what requires two culpable parties, and the absence of the former phrase from Section 2607(b) means that it can reach unilateral action. U.S. Br. 16. There is no evident reason this is so (and the brief does not explain the point in detail). Moreover, even if the United States is correct about Section 2607(a), the phrase "any portion, split, or percentage" is the functional equivalent in Section 2607(b) to the Section 2607(a) phrase "any agreement or understanding" in confirming that two culpable actors are required under both Sections.

giving and accepting of a "thing of value"—for example, services in-kind, such as free legal work pursuant to an express referral agreement. Section 2607(b) is, at the same time, broader because it prohibits one settlement service provider from paying an unearned fee to another settlement service provider even when there is no evidence (as would be required under Section 2607(a)) that the unearned fee is given in exchange for the referral of business. Thus, Section 2607(b) is a companion provision to Section 2607(a) allowing lawsuits and enforcement actions when the nature of the financial arrangement between two settlement service providers suggests a kickback but where an express referral arrangement is either nonexistent or may be difficult to prove. Sections 2607(a) and (b) are complementary, not redundant.

The United States contends that Section 2607(d) supports a single-person violator theory because it speaks of the "person or persons" who violate the statute. U.S. Br. 15. But Congress has repeatedly used both the singular and the plural in statutes that involve conduct requiring the participation of two or more persons. See, *e.g.*, 18 U.S.C. § 1963(a) ("whoever violates any [RICO] provision," and detailing penalties for "the person" and "such person"); 18 U.S.C. § 1511 (conspiracy statute imposing liability on "whoever" violates it); 18 U.S.C. § 1956 (liability for "any person who conspires"). Moreover, as originally enacted, Sections 2607(a) and 2607(b) had separate liability provisions which identically identified those subject to suit as "any person or persons who violate" the subsection. Pub.

L. No. 93-533, § 8(d), 88 Stat. 1724, 1728 (1974). Since Section 2607(a) always has required two culpable parties, the "person or persons" language that was carried through in a consolidating amendment to Section 2607(d) is no evidence that a single party can violate Section 2607(b). If any clue can be drawn from Section 2607(d), it is that Congress anticipated that all violations of Section 2607 would involve two culpable people, not one, since Section 2607(d) creates only "joint and several" civil liability.

2. The Fifth Circuit's construction finds additional purchase in RESPA's express "findings and purpose." 12 U.S.C. § 2601. Section (a) of that provision states:

> The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused *by certain abusive practices* that have developed *in some areas of the country*.

(emphasis added). Section (b) of that same provision, stating the Act's purposes, then identifies the abusive practices Congress was intending to address:

> It is the purpose of this chapter to effect certain changes in the settlement

> process for residential real estate that will result—
>
> * * *
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services * * *

Nowhere did Congress indicate that it was enacting a sweeping federal prohibition against all supposedly unearned fees.

Petitioners and the United States argue that it would be more consistent with RESPA's consumer protection purposes to read Section 2607(b) as a broad unearned-fee prohibition. Pet. Br. 25–28; U.S. Br. 20–23. But "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Bd. of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); see also *Dolan* v. *United States*, 130 S. Ct. 2533, 2547 (2010) ("'[N]o legislation pursues its purposes at all costs,' and 'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (citation omitted). Congress spoke in precise terms here, using a series of words and phrases that each clearly show that it was intending to enact a limited, though important, provision that addresses only collusive conduct among providers; "the objective of a statute is not a warrant to disregard" those terms.

Mercado v. *Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985).

Moreover, the assumption that interpreting the statute as written is bad policy which will result in the charging of allegedly unearned fees, (Pet. Br. 26–27; U.S. Br. 20–23), fails to give credit to the balancing of approaches Congress took, including its decision to regulate primarily by requiring additional disclosures. This case illustrates the point. Petitioners freely agreed to pay the loan discount fees after the charges were disclosed to them, pursuant to RESPA, multiple times before closing. The fees were earned as a component of the price petitioners willingly paid in order to get the loans that they wanted. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11).[9] Indeed, petitioners never sought rescission (a right that two of the three couples could have exercised within three days after closing, no questions asked, 15 U.S.C. § 1635), or otherwise claimed their loans were anything but reasonably priced.[10] Giving effect

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[9] Since the interest rate is a term of the loan, not a service, the payment of loan discount fees is not covered by RESPA. *Wooten* v. *Quicken Loans Inc.*, 626 F.3d 1187 (11th Cir. 2010), *cert. denied*, No. 11-43 (Oct. 3, 2011). The United States' lengthy argument to the contrary (U.S. Br. 28-30) never grapples with the fact there is no "service" involved in the setting of an interest rate (or in decreasing the rate). 626 F.3d at 1194-95.

[10] Much of the *amicus* brief filed by certain State Attorneys General amounts to nothing other than a series of suggestions as to why the law ought to be changed; while Quicken Loans strongly disagrees with *amici*'s comments about the effectiveness or the wisdom of RESPA, the brief is off point, for

to the plain meaning of Section 2607(b) does not leave consumers helpless, for when a lender such as Quicken Loans discloses a charge, "earned" or not, the consumer is well-equipped to take that information into account when choosing between the lender and its competitors.[11]

It is clear that Congress intended to take only a measured step in this complicated field. When it enacted RESPA in 1974, Congress directed HUD to report back to it in three to five years regarding "the necessity for further legislation in this area." RESPA, Pub. L. No. 93-533, § 14(a), 88 Stat. 1724, 1730 (1974) (Section repealed 1996). Among other things, Congress specifically asked HUD to consider whether "Federal regulation of the charges for real estate settlement services in federally related mortgage transactions is necessary and desirable." *Id.* In this way, Congress explicitly deferred consideration of more comprehensive measures for another time, after further study could be made of the issues. The admitted limitations on the steps Congress was taking provides important support for the limited construction made by the Fifth Circuit.

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the only issue in this case is what the statute was intended to mean when it was enacted in 1974.

[11] Quicken Loans provided evidence in the District Court that the loan discount fees were a component of the price, and so were earned. JA 63 (¶ 8), 64 (¶ 15), 104 (¶ 11). The United States' speculation that the fee was "duplicative" (U.S. Br. 32) is not to the contrary, for the brief does not even identify any fee it supposedly duplicated.

C. The History Of RESPA Shows That Section 2607(b) Was Meant To Forbid Only The Splitting Of Fees.

If the Court concludes that the words and context of Section 2607(b) do not fully answer the question in this case, the legislative history sheds a "reliable light" on Congress' understanding of the law at the time of its passage. *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). In the history, the Court will find repeated and unequivocally-expressed intention that the sole reach of Section 2607(b) was to prevent fee collusion between two culpable providers.

1. Congressional concern over settlement costs traces its roots to 1970 when, as part of a bill to increase the availability of funds for mortgages, Congress directed HUD and the Veteran's Administration to prepare a study with recommendations for reducing and standardizing closing costs. Emergency Home Finance Act, Pub. L. No. 91-351, § 701(b), 84 Stat. 450, 462 (1970). In 1972, the resulting HUD-VA Report was issued within a month of a four-part, front-page *Washington Post* exposé on hidden kickback and referral payment arrangements among settlement providers in the Washington, D.C. area. HUD-VA, REPORT ON MORTGAGE SETTLEMENT COSTS (Mar. 1972); Ronald Kessler, *The Settlement Squeeze*, Parts I-IV, *Washington Post*, Jan. 9-12, 1972, § A, at 1. Both the HUD-VA Report and the *Post* articles highlighted the practice of settlement providers—particularly title companies—surreptitiously sharing portions of

borrower-paid fees with other settlement providers—typically lawyers.

2. About a month after the *Post* articles appeared, and the day after HUD Secretary George C. Romney's Congressional testimony on findings in the HUD-VA Report,[12] Representative Wright Patman, the Chairman of the House Banking Committee, introduced the "Real Estate Settlement Cost Reform Act of 1972." H.R. 13337, 92nd Cong. (Feb. 23, 1972). In line with the specific focus of the Report and the *Post* articles, Rep. Patman's bill (in relevant part) focused exclusively on prohibiting lawyers from receiving any commission for title insurance, out of a concern that attorneys were performing no services yet sharing in the fees title companies collected from consumers. See *id.* § 103(a) ("Prohibition Against Certain Attorneys Receiving Title Insurance Commissions").

A substitute bill eventually passed the House Banking Committee, which, for the first time, introduced the language prohibiting the giving or receiving of any "portion, split or percentage" of any charge for title insurance other than for services actually performed. H.R. 16704, 92nd Cong. (1972);

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[12] Though the HUD-VA Report is post-dated, it was submitted to Congress prior to HUD Secretary Romney's February 22, 1972 testimony before a subcommittee of the House Banking Committee. *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, And Site Selection Policies, Hearing On H.R. 13337 Before The Subcomm. On Housing Of The H. Comm. On Banking And Currency,* 92nd Cong. 20, 735 (1972).

H.R. Rep. 92-1429, at 88, 158 (Sept. 21, 1972). While expanding the provision beyond lawyers, the bill continued to focus only on the sharing of unearned moneys between settlement providers: "Any person who gives and any person who receives any portion, split or percentage of any or all charges for *title insurance* in connection with any real estate settlement involving a federally-related mortgage loan, other than for services actually performed in the issuance of such *title insurance*, shall be jointly and severally liable to the person or persons charged for the portion, split, or percentage in an amount equal to three times the portion, split or percentage." H.R. 16704, § 907 (emphasis added).

3. After this bill failed to pass the House in 1972, it was reintroduced there in 1973. The relevant portion of the 1973 version was expanded to apply to collusion regarding any settlement service fee, not just title insurance. H.R. 9989, 93rd Cong., § 106(b) (Aug. 3, 1973). A companion bill, with identical fee-splitting language, was introduced later in the Senate. S. 3164, 93rd Cong., § 7(b) (Mar. 13, 1974). Thus, the evolution of the bills—first addressing fees split between title companies and lawyers, then fees split between title companies and any other provider, and finally any settlement fees split between any settlement providers—reveals a consistent, and limited, purpose.

The House and Senate Committee Reports on the bills confirm that both Chambers intended Section 2607(b) to prohibit only undisclosed fee splits between providers. The Senate Report clearly identified Section 2607 as an anti-collusion measure

aimed exclusively at interactions between service providers:

> Section [2607] is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from *giving or rebating any portion of the charge to any other person* except in return for services actually performed."

S. Rep. No. 93-866, at 5 (1974), 1974 U.S. Code Cong. & Admin. News 6546, 6551 (emphasis added). The House Committee Report contains the exact same statement on the scope of Section 2607. H.R. Rep. No. 93-1177, at 7 (1974). Both Reports then list representative prohibited acts, all of which involve the sharing of a fee between two settlement providers, including where "a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services," and where "an attorney may give a portion of his fee to another attorney, lender or realtor who simply refers a prospective client to him." S. Rep. No. 93-866, at 5; H.R. Rep. No. 93-1177, at 7.[13]

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[13] The final bill that passed both Chambers was S. 3164, which for Section 2607 purposes was identical to the House bill. Compare H.R. 9989, 93rd Cong., § 106(b) with RESPA, Pub. L. No. 93-533, § 9, 88 Stat. 1724, 1727-28 (1974).

The requirement of two culpable parties was also explicitly emphasized by the bill's sponsors in both Chambers. After the initial debate and passage of the House version, but before the passage of the final bill that came out of the Conference Committee, House sponsor Rep. Blackburn entered a written statement into the Congressional Record to emphasize (to members concerned about the scope of civil liability) that two settlement providers are required for a violation of Section 2607(b):

> The House Banking Committee report makes clear that [Section 2607(b)] was intended to deal only with fee-splitting arrangements among participants in the settlement process * * *
>
> When Section [2607(b)] says that no person shall give a portion of the fee to anyone else except for services actually performed, *it is clear that the word 'person' does not refer to the homebuyer or seller himself* who is purchasing a settlement service.

120 Cong. Rec. 29,442–43 (Aug. 20, 1974) (Written Statement of Rep. Blackburn) (emphasis added). See also 120 Cong. Rec. 6,586 (Mar. 13, 1974) (Statement of Sen. Brock, Senate sponsor) (Section 2607(b) intended to "prohibit any fee-splitting among persons who render settlement services").

4. Other aspects of the history further support the conclusion Section 2607(b) was intended to address only provider relationships, not direct charges. In enacting RESPA, Congress considered in

detail and expressly rejected the alternative that the amount of settlement service charges be determined and regulated by the government. That alternative was first laid before Congress in the Congressionally-mandated 1972 HUD-VA Report, which recommended the development and implementation of standards for fixing maximum charges for settlement costs. HUD-VA Report, at 3.[14] Senator William Proxmire introduced legislation, in direct competition for legislative favor with the bill that became RESPA, that would have required HUD to do just that. S. 2288, 93rd Cong. (July 1974); S. Rep. 93-866, at 2. The Proxmire proposal was seriously considered, and addressed directly in RESPA's Senate Report as a possible alternative to the bill ultimately enacted. S. Rep. 93-866, at 3.

Congress, however, rejected the rate regulation option, in favor of "regulat[ing] the underlying business relationships and procedures of which the costs are a function." S. Rep. 93-866, at 3. Instead of direct rate regulation, RESPA directed HUD to submit a report addressing "whether Federal regulation of the charges for real estate services * * * is necessary and desirable," and, if so, giving "a description and analysis of the regulation regime [HUD] believes Congress should adopt." Pub. L. No.

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[14] The 1970 statute which had commissioned the HUD-VA study gave HUD the authority to set limits on settlement costs for FHA and VA loans. Pub. L. No. 91-351, § 701(a), 84 Stat. 450, 461. Although HUD issued proposed rate regulations for six metropolitan areas, 37 Fed. Reg. 13,186 (July 4, 1972), the regulations never became effective.

93-533, § 14. HUD's report, issued in 1981, recommended the elimination of substantially all of RESPA in favor of a system of regulated, lender-packaged closing costs. HUD, REPORT TO CONGRESS ON THE NEED FOR FURTHER LEGISLATION IN THE AREA OF REAL ESTATE SETTLEMENTS, at IV-1 (Sept. 1981). Congress never adopted HUD's recommendation.

Congress' rejection of legislative attempts at settlement cost rate regulation, and its lack of further action after receiving HUD's 1981 follow-up report, further support the conclusion that the purpose of RESPA was not to regulate a wholly-retained charge by a single party, but instead to bring more transparency to the settlement process while at the same time regulating the "underlying business relationships" that lead to backroom kickbacks and fee splits.

5. In contrast to this detailed history, or perhaps because of it, petitioners do not discuss the legislative history. Pet. Br. 16–28. The government mentions it only in passing, citing two comments in the introductory parts of the committee reports that stated that RESPA addresses "kickbacks and unearned fees." U.S. Br. 23. But the reports' reference is equivocal, because Section 2607(b) under any view outlaws unearned fees of some sort, and so the citation does not answer the issue in this case.[15]

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[15] For the same reason, the label placed on Section 2607, "Prohibitions Against Kickbacks and Unearned Fees," does not point persuasively towards either party's position in this case. *But see* Pet. Br. 24, U.S. Br. 22.

It also provides no license to ignore the more specific expressions of intent contained in those same reports, and elsewhere, which compel the conclusion that Section 2607(b) was never intended to be a blanket unearned fee statute.

D. The Arguments For A Contrary Interpretation Of Section 2607(b) Are Unpersuasive.

1. Petitioners offer a panoply of arguments for reading Section 2607(b) to prohibit unearned undivided fees. They focus primarily on the phrase "any portion, split, or percentage." Pet. Br. 17–20. They argue that the phrase contemplates unilateral action by a service provider who receives all of the settlement service charge. As they point out, the words "portion" and "percentage" can, in limited circumstances, include the entirety of something. But that argument ignores the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The susceptibility of the words "portion" and "percentage" to alternative meanings "does not render the word[s] * * * whenever [they are] used, ambiguous." *Id.* at 131; *accord Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066

(2009). The context here forecloses petitioners' inventive construction.[16]

The modifier "any" does not convert these three words connoting a division into words meaning the entirety of a thing. Putting "any" in front of them does not rob them of their common meaning, or make them ambiguous as the Second Circuit ultimately found. *Cohen*, 498 F.3d at 117. In normal English usage, which should control here, one would most naturally use the terms "any portion" or "any percentage" to refer to a part of something. *E.g.*, *DePierre* v. *United States*, 131 S. Ct. 2225, 2226 (2011) (adopting "[t]he most natural reading of" the statute); *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1892 (2011) (giving the text "its most natural reading").

Petitioners are not helped by Congress' use of the word "portion" in embezzlement statutes. Pet. Br. 13, 17. Those statutes, like the ones mentioned in *Cohen* forbidding a federal official from accepting "any portion of the money" from a person making a customs seizure, or a lender from collecting from a student "any portion of the interest" on a student loan payable by the government (498 F.3d at 118), all contemplate on their face the activity of a single person acting alone. As the Second Circuit was forced to acknowledge in *Cohen*, construing the word

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[16] That interpretation also should be rejected because it would render one of those two words surplusage. *Bd. of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

"portion" in those statutes as not proscribing the acceptance of "the whole of the moneys at issue * * * would appear to border on the absurd." *Id.* But the use of the word "portion" in these other statutes is irrelevant to the interpretation of the word "portion" when it appears in a statute contemplating two culpable actors ("no person shall give and no person shall accept") and when it is joined with the words "split" and "percentage."

Statutes that use the word "percentage" explicitly to include 100 percent, mentioned by the United States (U.S. Br. 18), are no more help to petitioners. Each of these statutes speaks of a "percentage" of something—*e.g.*, a contribution to a retirement fund (5 U.S.C. § 8348(g)), a vested right in accrued employer contributions to a pension plan (29 U.S.C. § 1053(a)(2)(A)(iii)), land planted to upland cotton eligible for a farm subsidy (7 U.S.C. § 1428(b)) – that typically changes over time and may reach 100%. These elaborate statutory schemes expressly involve different percentages prescribed at different times and, even if one of the enumerated percentages happens to be 100%, the fact remains that the word "percentage" in common usage normally means less than the entire amount. Section 2607(b) involves a single transaction and does not mention specific percentages, but instead uses the word "percentage" side by side with "split" and "portion," and thus the normal, everyday meaning of the word—"a part of a whole expressed in hundreds" (WEBSTER'S THIRD NEW INT'L DICTIONARY, 1675 (1993))—should be presumed to be the one Congress intended.

2. The United States contends that construing Section 2607(b) to apply only to transactions between service providers is "misconceived" because an initially lawful acceptance of a fee would become unlawful if the recipient then "shared the money with another culpable actor." U.S. Br. 15. The point does not go beyond the stylized example because the hypothetical plainly involves two transactions: the initial receipt of the fee that is earned (presumably, from the borrower) and the subsequent split of that fee into parts that are earned and unearned, with an unearned part given to and accepted by another. The second transaction is proscribed because that is precisely the misconduct against which the statute is aimed: it forbids the sharing of an unearned part with "another culpable actor." That the second transaction is illegal does not mean that the first was, or that the first somehow would be converted into an illegal transaction by what is later done with the money.

The United States also argues that no policy rationale exists for distinguishing joint from unilateral action under Section 2607(b). U.S. Br. 11. That is not so. In the context of this statute, unilateral conduct is different because it already is being regulated by RESPA's disclosure rules, whereas Section 2607 targets backroom deals not disclosed to the consumer. Like the Truth in Lending Act passed in the same era, the balance Congress struck in RESPA regulates the consumer-service provider relationship primarily through disclosure, including a required itemization of settlement service charges at the very start and at

the very end of a real estate transaction. See 12 U.S.C. §§ 2604(c) (good faith estimate of charges), 2603(b) (closing statement). Empowered by this information, the consumer can react to unilateral pricing conduct by shopping, comparing, and negotiating. See HUD, *Looking For the Best Mortgage? Shop, Compare, Negotiate*. Section 2607 complements the disclosure regime by regulating "underlying business relationships" among providers that are not revealed on the HUD-1. S. Rep. 93-866, at 3. It is sensible in light of this overall regulatory structure not to turn Section 2607(b) into a substantive regulation on the direct relationship between borrowers and lenders.

3. Petitioners also dispute the Fifth Circuit's reading of the phrase "no person shall give and no person shall accept" as plainly requiring "an exchange or transaction, not a unilateral act." Pet. App. 7a, *quoted in* Pet. Br. 20. They embrace the Eleventh Circuit's ruling in *Sosa*, that the word "and" within the phrase unambiguously creates two separate provisions that may be violated independently. 348 F.3d at 982. Though the Eleventh Circuit in *Sosa* found that any contrary reading "rests on a misunderstanding of English grammar," *id.*—the four courts of appeal that read Section 2607(b) as requiring two culpable actors disagree with the conclusion. Pet. App. 7a; *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879; *Boulware*, 291 F.3d at 266. Even the courts of appeal favoring petitioners' position do not share the *Sosa* court's assertion the result is compelled by the rules of grammar. *Cohen*, 498 F.3d at 116–20; *Santiago* v.

GMAC Mortg. Group, Inc., 417 F.3d 384, 388 (3d Cir. 2005); *Kruse* v. *Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58 (2d Cir. 2004).

The idea, advanced in *Sosa*, that a contrary construction that reads the law as requiring both a culpable giver and acceptor would lead to irrational results is also incorrect. The *Sosa* court postulated the situation in which someone tries to give a kickback, but the intended recipient refuses to accept it, and the court found it odd that the kickback offerror "would not have violated *subsection 8(b)*, because there was no culpable acceptor." *Sosa*, 348 F.3d at 983. But that result is not irrational at all, for failed attempts to give or receive unearned fees do not increase settlement charges.

E. Petitioners' Construction Is Disfavored For It Would Allow Direct Regulation Of What A Provider Could Charge, Which Every Court of Appeals Has Found Is Not Within The Reach Of RESPA.

Petitioners' proposed construction of Section 2607(b) is incorrect for the further reason that it would create liability for conduct that reaches far beyond wholly unearned charges. If it prohibits accepting a *wholly* unearned charge, because, as petitioners reason, Congress meant to outlaw all "unearned" fees, there seems little reason not to conclude that Section 2607(b) also prohibits imposing *any amount* of a charge that can be described as unearned. HUD has articulated precisely this view of Section 2607(b), finding "legally indistinguishable," and illegal, (1) "markups" (where

one provider marks up another provider's invoice, while providing no further services), (2) "overcharges" (where a provider makes an unreasonable charge for services the provider supplies itself), and (3) unearned, undivided fees. 66 Fed. Reg. at 53,057. The statute cannot bear this construction, however, as every court to have considered the issue has concluded.

The courts of appeal are unanimous in holding (directly or by necessary implication) that Section 2607(b) does not regulate, or prohibit, overcharges.[17] As the Second Circuit explained in detail in *Kruse*, Section 2607(b) on its face does not provide for such regulation. As detailed above, history shows that Congress made a deliberate choice in 1974 to enact RESPA rather than competing proposals for direct price regulation, and commissioned HUD to study whether such regulation should be introduced in the future. 383 F.3d at 56–57. The unanimous view of the courts of appeal on this point all came in the face of HUD's contrary opinion that the unreasonable

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[17] *Martinez* v. *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 554 (9th Cir. 2010); *Friedman* v. *Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1296 (11th Cir. 2008); *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56. The Fourth, Seventh, and Eighth Circuit decisions have considered alleged markups only but the courts speak interchangeably of markups and overcharges and the rationales of their rulings would reach overcharges as well as markups. *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 879; *Boulware*, 291 F.3d at 265. Since the Fifth Circuit in the case at bar held that unilateral conduct is not reached by Section 2607(b), the necessary implication is that overcharges are also not reached by the law. Pet. App. 5a-6a.

portion of a provider's charge is "unearned," and prohibited, because (in HUD's view) Section 2607(b) is meant to outlaw all unearned fees.

That Section 2607(b) cannot reach overcharges logically leads to the conclusion that the Section also does not cover either markups or charges for allegedly unperformed services. Nothing in the language or history of Section 2607(b) illuminates any manner in which Congress might have meant to distinguish among the ways in which a service provider might unilaterally impose fees, outlawing some but permitting others. Rather, as discussed, the statute addresses that issue through requiring detailed and repeated fee disclosures.

The conclusion that Section 2607(b) does not reach unilateral conduct is underscored by the facts of the case at bar. It was admitted in the District Court that the loan discount fees at issue were part of the pricing of the loan for the terms petitioners selected. JA 54–55, 96–97. If petitioners are correct about the reach of the law, the District Court on remand will not be able to decide the ultimate question of whether each loan discount fee was "unearned" without deciding whether the total price charged to petitioners was, in each of the three instances, too high. Such an inquiry is wholly inconsistent with RESPA, and is precisely the kind of standardless, *post hoc* judicial ratemaking that the courts of appeal have rejected. *Martinez*, 598 F.3d at 554; *Friedman*, 520 F.3d at 1296; *Santiago*, 417 F.3d at 387; *Kruse*, 383 F.3d at 56.

If the statute applied to unilateral charges, every alleged markup or charge for unperformed services would present the question whether the provider actually performed services justifying compensation; for HUD, that means services that are substantial enough to meet its test of not being nominal or duplicative. 24 C.F.R. § 3500.14(c); 66 Fed. Reg. at 53,059. That in turn will lead to the "reasonableness" (or price control) inquiry that Congress did not intend.[18] Petitioners' construction embraces this type of inquiry, and is the wrong construction for that reason.

II.

IF SECTION 2607(b) IS AMBIGUOUS, IT SHOULD BE CONSTRUED NOT TO REACH UNDIVIDED CHARGES.

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[18] It will also lead to other results Congress could never have intended. In *Sosa*, after holding that an alleged markup of messenger fees was actionable under Section 2607(b), the court of appeals nonetheless affirmed the dismissal of the complaint because the court did "not believe that the borrowers could credibly" allege that the lender had performed no services because it had after all arranged for the messenger. 348 F.3d at 983. That analytical approach, which is likely to apply to every alleged mark-up and charge in unperformed services case, would mean that a charge of $10 for truly unperformed services would be illegal while a $90 fee for arranging for a $10 service is legal. That irrational outcome should not be ascribed to Congress.

A. The Fifth Circuit's Interpretation Is Well Supported And Consistent With The Rule of Lenity.

Even if the Court finds that Section 2607(b) is ambiguous in its reach, it should affirm the Fifth Circuit's decision (and that of a majority of the courts of appeal) that the statute only applies to conduct of two or more culpable actors. As the Fifth Circuit explained, and as further discussed herein, this interpretation finds support in multiple words and phrases contained in Section 2607(b), is most consistent with the larger context of RESPA and its other provisions, and is the only reading that finds any substantial support in legislative history. Section 2607(b) remains an effective provision under this construction, but one that is not broader than Congress intended.

Apart from these factors, the Court should resolve any ambiguity in favor of the Fifth Circuit's construction because limiting Section 2607(b) as the court did there is appropriate under the rule of lenity. A violation of Section 2607(b) carries the potential for criminal penalties in addition to civil liability. 12 U.S.C. § 2607(d)(1) (maximum penalty of one year imprisonment and $10,000 fine). If Section 2607(b) is indeed ambiguous, the rule of lenity requires the Court to construe the statute narrowly. *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."). That is so even when the issue arises in a civil case such as this one. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325

(2011), *citing Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n. 8 (2004).

Applying that rule, any ambiguity in Section 2607(b) as to whether it only reaches conduct by two culpable parties or reaches more broadly should be resolved in favor of the narrower construction. Under that construction, the Fifth Circuit's conclusion as to the proper scope of Section 2607(b) should be affirmed.

B. HUD's Regulatory Guidance Does Not Support Resolving Any Ambiguity In Section 2607(b) In Petitioners' Favor.

Petitioners contend that HUD has construed Section 2607(b) to apply to unilateral charges in two sources—HUD's RESPA regulation (known as Regulation X, 24 C.F.R. pt. 3500) and its Policy Statement—and further contend that both sources are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. Br. 29–41. That is not correct. By its plain terms, Regulation X prohibits only unearned splits of fees, and so supports the Fifth Circuit's interpretation, not petitioners'. To the extent that either Regulation X or the Policy Statement read Section 2607(b) differently, they are not entitled to deference.

1. The text of Regulation X confirms the Fifth Circuit's interpretation of Section 2607(b). The part of the regulation that addresses Section 2607(b) provides HUD's own description of what it proscribes: "*No split of charges* except for actual services performed." 24 C.F.R. § 3500.14(c)

(emphasis added). This Court has previously looked to headings to guide its interpretive task, see *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), and here the heading strongly indicates that HUD viewed Section 2607(b) as applying only to "split[s] of charges," not to all unearned fees.

Other portions of Regulation X reinforce this interpretation. To take one telling example, Regulation X authorizes HUD to "investigate high prices to see if they are the result of a referral fee or a split of a fee," but does not mention mounting investigations into so-called unearned fees. 24 C.F.R. § 3500.14(g)(2). It is hard to imagine that HUD would have delineated its investigatory authority while omitting an entire class of conduct unless the agency did not believe that conduct (first-party charges) violated RESPA.

The final sentence of Section 3500.14(c) is consistent with the Fifth Circuit's interpretation as well. It provides that Regulation X's proscriptions may not "be avoided by creating an arrangement wherein the purchaser of services splits the fee." 24 C.F.R. § 3500.14(c). If all unearned first-party fees were prohibited under Regulation X, it would make little sense to specify that service providers may not "avoid[ ]" that prohibition by having the customer divide a third-party fee into unearned first-party fees. Unearned fees would be covered no matter how they were distributed. The sentence instead is an ancillary prohibition to prevent service providers from circumventing the rule, applicable to them, against "giv[ing]" an unearned portion of a fee to a

third party by having the customer, rather than the provider, split, and then give, the fee.[19]

Petitioners nevertheless contend that Regulation X prohibits all unearned fees, because Section 3500.14(c) states, in the middle of the paragraph: "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c). The quoted line cannot bear the weight petitioners place on it. The sentence stands as part of the section labeled "No split of charges," and has no further elaboration on its meaning. This context gives every indication that the sentence is not meant to be the type of sweeping rule petitioners advocate. An administrative agency, just like Congress, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467–68 (2001). If HUD had intended to give Section 2607(b) a wide application it surely would have afforded the issue more extensive treatment in the regulation.

The better view is that the quoted sentence was meant solely to clarify the statutory phrase of

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[19] Appendix B to Regulation X further undercuts petitioners' interpretation. The Appendix contains various illustrations designed to "provide additional guidance on the meaning and coverage of the provisions of RESPA." 24 C.F.R. pt. 3500, App'x B. Not *a single one* of the fourteen illustrations involves unilateral conduct.

Section 2607(b) that precedes it in the regulation's previous sentence, "charge * * * other than for services actually performed." RESPA and Regulation X contains no other explanation for what that phrase means. It is a natural reading of the regulation as intending to provide that definition, namely, a "charge * * * for which no or nominal services are performed or for which duplicative fees are charged."

The history of the 1992 amendment to Regulation X, when this language first appeared, confirms this reading. HUD indicated several times in the notice of proposed rulemaking and the preamble to the final regulation that it viewed Section 2607(b) as prohibiting only the splitting of fees other than for services actually performed.[20] The proposed version of the rule did not signal a different understanding; it merely parroted the statute. See 53 Fed. Reg. at 17,438. After reviewing the comments, HUD decided to "add[ ] some language clarifying what constitutes payment and services for purposes of Section [2607]." 57 Fed. Reg. at 49,605. That "clarifying" language to describe "what constitutes payment and services" included the sentence petitioners now highlight. That sentence simply describes the circumstances

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[20] See 57 Fed. Reg. 49,600 (Nov. 2, 1992) ("Section [2607] of RESPA * * * prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees")); 53 Fed. Reg. 17,424 (May 16, 1988) (same); *id.*, at 17,431 ("Section [2607](b) * * * prohibits splitting of charges"); *id.*, at 17,432 ("text of Section [2607](b)" prohibits "split of charges").

where a fee is considered unearned—*i.e.*, when "no or nominal services are performed" or when "duplicative fees are charged."[21]

2. Even had this sentence in Section 3500.14(c) been intended to prohibit unilateral conduct, it would not be entitled to deference under *Chevron*. The "ultimate question" under *Chevron* is "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) (emphasis omitted). Here, Congress left no gap to fill: it spoke directly to the issue of what practices are prohibited under Section 2607(b). Whatever remaining ambiguity might conceivably be pointed to is not the type of ambiguity that invites agencies to fill the statutory interstices with their own expert policy judgments. See *Krzalic*, 314 F.3d at 883 (Easterbrook, J., concurring) ("Agencies' interpretive role stems from delegation of authority, not raw ambiguity."). *Compare, e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006) (phrase was "ambiguous in the relevant sense" because it was "a generality, susceptible to more precise definition and

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[21] The example at 24 C.F.R. § 3500.14(g)(3), which petitioners cite as evidence in support of their interpretation, was likewise added to clarify what constitutes a payment for services rendered. The scenario corresponds to Illustration Four in Appendix B, which makes it clear that the lawyer in the example is splitting a fee with a separate entity, a title insurance company. See 24 C.F.R. pt. 3500, App'x B.

open to varying constructions"), with *Carcieri*, 129 S. Ct. at 1069 (Breyer, J. concurring) (where Congress "focused directly upon [the] language [at issue], believing it definitively resolved a specific underlying difficulty; and nothing in the history indicated that departmental expertise should play a role" in determining the meaning of the terms, agency's interpretation was "not entitled to *Chevron* deference, despite linguistic ambiguity") and *Barber* v. *Thomas*, 130 S. Ct. 2499, 2516 (2010) (Kennedy, J., dissenting) (similar). Defining the conduct Section 2607(b) prohibits calls for a legal judgment, not a policy judgment. There is consequently neither need nor warrant for the Court to defer to HUD's interpretation of Section 2607(b). See *Negusie* v. *Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("Certain aspects of statutory interpretation remain within the purview of the courts, even when the statute is not entirely clear, while others are properly understood as delegated by Congress to an expert and accountable administrative body.").

Moreover, to the extent that Regulation X purports to set forth a new theory of liability under Section 2607(b), it is not binding on this Court because it is both procedurally defective and arbitrary and capricious. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (a regulation made pursuant to delegated lawmaking authority "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"). As noted above, the proposed version of Regulation X that introduced the

language on which petitioners rely did not contain that sentence and the proposed rule otherwise gave no indication that HUD was considering an interpretation of Section 2607(b) that would apply the law to undivided fees. If the sentence really does what petitioners say it does, then the regulation was not "reasonably foreseeable" and so was procedurally defective. *Long Island Care at Home*, 551 U.S. at 175. Moreover, if petitioners are correct, HUD's failure to give any explanation for that interpretation of Section 2607(b) renders the regulation arbitrary and capricious. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479, 483, n. 7 (2011) ("When an administrative agency sets policy, it must provide a reasoned explanation for its action."). These defects deprive Regulation X of binding legal force. At a minimum, this Court should not construe the regulation in a fashion that would require it to be struck down.

3. In marked contrast to Regulation X, HUD's 2001 Policy Statement clearly set forth the agency's position that Section 2607(b) applies to unilateral conduct. But the Policy Statement is not entitled to *Chevron* deference. As petitioners correctly recognize, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27. The Policy Statement does not meet that test because it does not carry the force of law.

The Policy Statement was issued as an interpretation of Section 2607(b), explicitly labeled as "guidance," and without notice-and-comment procedures. 66 Fed. Reg. 53,052, 53,053. Petitioners are correct that the absence of notice-and-comment procedures is not by itself dispositive of whether the agency is taking an action with the force of law, but it is "significant * * * in pointing to *Chevron* authority." *Mead*, 533 U.S. at 230–31; *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 714 (2011). HUD was able to bypass notice-and-comment because the Administrative Procedure Act and HUD's own regulations exempt "interpretive rules." 5 U.S.C. § 553(b)(A); 24 C.F.R. § 10.1. See *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("an interpretive rule [is] 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"), *quoting Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302, n.31 (1979)). HUD's decision to bypass notice-and-comment procedures and instead issue a statement of policy has important implications.

Unlike substantive rules, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala*, 514 U.S. at 99; see also Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 432-33 (5th ed. 2010). Interpretive rules do not represent an exercise of "delegated lawmaking powers" entitled to *Chevron* deference. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). As the Court put it in *Mead*, "interpretive rules * * * enjoy no *Chevron* status as a class." 533 U.S. at 232.

See also, *e.g.*, *Long Island Care at Home*, 551 U.S. at 172 ("an 'interpretive' regulation * * * used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means * * * may 'persuade' a reviewing court, but will not necessarily 'bind' a reviewing court") (citations omitted); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements * * * do not warrant *Chevron*-style deference"). Having decided to issue an interpretation rather than promulgate a regulation, HUD chose for the interpretation not to carry the force of law.

The statutory provision authorizing the Secretary of HUD to issue "interpretations" of RESPA does not alter that conclusion. 12 U.S.C. § 2617(a). As an initial matter, this particular interpretation was issued and signed by an Assistant Secretary (66 Fed. Reg. 53,052, 53,059), and so does not gain any special authority from Section 2617(a).[22] Moreover, even if it qualifies under that provision, *Chevron* deference attaches only to the exercise of delegated *lawmaking* authority, on the theory that expert agencies are better situated than courts to make the policy judgments that necessarily arise during lawmaking. *Mead*, 533 U.S. at 232–33; *Chevron*, 467 U.S. at 843–44. The Policy Statement is plainly not an exercise

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[22] See David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 236 (2001); see also *Keys v. Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003) ("it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions").

of delegated lawmaking authority; rather, in HUD's own words, it is "guidance" and a "formal pronouncement of [HUD's] interpretation of relevant statutory and regulatory provisions." 66 Fed. Reg. at 53,052.

A grant of interpretive authority does not imply that Congress intended for the agency's interpretations to have the force of law. The Attorney General, for instance, has a broad grant of interpretive authority, see 28 U.S.C. §§ 511–13, 521, yet his opinions on legal matters do not ordinarily receive *Chevron* deference. See, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *United States* v. *Project on Gov't Oversight*, 616 F.3d 544, 551 (D.C. Cir. 2010). Without more, an express grant to an agency to do what agencies otherwise do—interpret the statutes they administer—should not be construed to grant power to make law without process.

But petitioners contend that there is more, suggesting that Congress expected that interpretations by HUD in policy statements would carry the force of law because 12 U.S.C. § 2617(b) shields from liability parties who act "in good faith in conformity with any rule, regulation, or interpretation [of RESPA] by the Secretary or the Attorney General." Pet. Br. 36. The argument has it exactly backwards. If Congress intended that HUD's interpretations would *be* the law, it would not have been necessary to provide immunity for good faith compliance with them. Indeed, by limiting such immunity only to delineated circumstances, *i.e.* where the party has actually relied, in good faith,

Congress clearly understood that some interpretations would turn out not to be the law. The Section is best understood as what it is: a fairness principle granting a safe harbor, to ensure that if a person or provider actually relies on an official interpretation, she or it has a good defense against the government (notwithstanding the bar on estoppel) and against a private party.[23]

4. HUD's views expressed in the Policy Statement are not persuasive, and so not deserving of deference on a lesser standard than *Chevron*'s.

The Policy Statement goes to great lengths to portray its interpretation as one of long standing, seeking the patina often given well-worn administrative approaches. Petitioners rely on this consistent interpretation argument to otherwise support their reading of the law. Pet. 15. As an initial matter, even had HUD been consistent over the years, it would have been consistently wrong.

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[23] *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 567–68 (1980), construing a similar provision in the Truth in Lending Act, concluded that creditors who had not disclosed certain rebate practices had a good defense in private litigation because the conduct had been approved by the Federal Reserve. It does not control the construction of RESPA here, not only because the case preceded much of the modern law as to administrative deference, but because it primarily concerned an administrative interpretation of the Federal Reserve's own regulations and the Court found of especial significance that the agency was directly involved in the creation of the law and had been delegated "broad administrative lawmaking power" by Congress to define the scope, extent and content of disclosures. *Id.*

Public Employees Ret. Sys. v. *Betts*, 492 U.S. 158, 170-71 (1989) ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

In any case, HUD's interpretive position has been far from unwavering. As discussed, the only notice-and-comment regulation implementing Section 2607(b) labels the section exactly as we would: "No split of charges except for actual services performed." As the Seventh Circuit noted, the heading "expresses clearly that HUD did not attempt to expand liability past situations involving fee splitting between the fee collector and a third party." *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623, 628 (7th Cir. 2001). The explanation accompanying the regulation, both as proposed and in final form, also adopted this narrow reading of the Section (53 Fed. Reg. at 17,424, 17,431, 17,432), as did HUD in its congressionally-mandated report to Congress on RESPA's implementation. 1981 HUD REPORT, at I-15. The indications of consistency identified in the Policy Statement or in the briefs of petitioners and the United States, including letters, booklets, reports of the HUD Inspector General (which is independent of HUD), website FAQs, withdrawn interpretations, and Federal Register notices for regulations never fully implemented, do not show a clearly-defined position at the agency. For example, the oldest of these sources describes the prohibitions of Section 2607 as "aimed primarily at" kickbacks. 41 Fed. Reg. 20,280, 20,289 (May 14, 1976). In examining many of these authorities prior to the Policy Statement, the Seventh Circuit found that HUD had not committed

to the position that Section 2607(b) addresses all unearned fees. *Echevarria*, 256 F.3d at 628.

When the Policy Statement actually explains why its interpretation is correct, its analysis is "perfunctory," as the court observed in *Krzalic*: "[HUD] gives no reason except that HUD has always regarded [marked up] fees as forbidden by the statute, though previously it had failed to make this clear. No evidence or interpretive methodology is mentioned; no abuse pointed to that might justify the contorted interpretation urged by HUD." *Krzalic*, 314 F.3d at 881 (Posner, J.); see also *id.* 883 (Easterbrook, J., concurring). Apart from its reliance on itself, HUD does articulate the view that the word "or" in the phrase "any portion, split, or percentage," causes it to conclude that Section 2607(b) "forbids the paying or accepting of any portion or percentage of a settlement service [charge]—including up to 100%—that is unearned," even if the entire charge "is retained by a single person." 66 Fed. Reg. at 53,058. The point is but a variation on petitioners' theme that the words portion and percentage can mean all, and so is equally unpersuasive for the reasons discussed above.

Petitioners attempt to bolster the Policy Statement by pointing out it was issued formally through the Federal Register by or for statutorily-described officials. But petitioners are simply wrong when they say this means the agency's position as to Section 2607(b) was "developed in a formal and deliberative process." Pet. Br. 36. No such "process" is revealed in the Statement itself and there was no advance notice or proposal suggesting a process ever

occurred as to that part of the Statement. See *Krzalic*, 314 F.3d at 881 ("One fine day the policy statement simply appeared in the Federal Register").[24]

Petitioners' remaining arguments contending that the Policy Statement is persuasive do not add to its force. Petitioners contend that HUD has expertise in the settlement service field, but that point is of limited support because subject-matter agencies always meet that test. Finally, the argument that the agency's construction should be obeyed because Congress acquiesced in it fails because, as discussed above and this Court is aware, HUD's interpretation of Section 2607(b) and that of the federal courts have been inconsistent at best.

5. Petitioners and the government suggest in passing that the Policy Statement is entitled to deference because it authoritatively interprets Regulation X. Pet. Br. 31; U.S. Br. 26 (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)). That is wrong for three reasons. First, the Policy Statement is not primarily an interpretation of Regulation X. Rather, the Statement concentrates on the statute, and

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[24] In marked and instructive contrast, the Policy Statement also addresses the legality under Section 2607(a) of certain payments to mortgage brokers, and is stated to be a clarification of an earlier policy statement which had been issued at Congressional direction and only after "HUD worked with industry groups, federal agencies, consumer groups and other interested parties in collectively producing" that statement. 66 Fed. Reg. at 53,052-53.

purports to interpret the law. *Auer* simply is not implicated.

Second, so-called *Auer* deference is unwarranted when the agency's current interpretation "runs counter to the 'intent at the time of the regulation's promulgation.'" *Gonzales*, 546 U.S. at 258 (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)). The relevant portion of Regulation X was intended to "clarify[ ] what constitutes payment and services for purposes of Section [2607]," not to address the issue of unilateral conduct. 57 Fed. Reg. at 49,605. HUD itself limited the regulatory reach of the section to "No split of charges."

Finally, HUD's interpretation of Regulation X is not entitled to deference because Regulation X gives little instruction on the central issue in this case: whether Section 2607(b) reaches undivided unearned charges. *Cf. Gonzales*, 546 U.S. at 257. HUD cannot "under the guise of interpreting a regulation * * * create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. If HUD's interpretation warrants *Auer* deference, it would confirm widespread fears that *Auer* "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); see also *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654–80 (1996). The agency cannot smuggle a radical new interpretation of Section 2607(b), a section that carries criminal

penalties, no less, into a regulation that plainly was not designed for that purpose. *Auer* does not require the Court to agree that the government may employ such a tactic here; to the extent the *Auer* principles suggest that it should, the Court should limit or overrule that case.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

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REPLY BRIEF

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TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

Quicken acknowledges that it would be liable in this case if it had shared with petitioners' mortgage brokers or another third party even a dollar of the unearned fees it charged petitioners. It contends, however, that the Real Estate Settlement Procedures Act (RESPA) unambiguously permits it to charge consumers the exact same unearned fees without fear of liability, so long as it retains all of the fraudulent charges for itself. Quicken says this follows from the plain text of the statute. But it does not contest for purposes of this appeal that it "accept[ed]" a "charge made . . . for the rendering of a real estate settlement service" involving a federally insured mortgage loan – the loan discount fee – and that the money it accepted was not for "services actually performed." 12 U.S.C. § 2607(b).[1] Nor does it seriously dispute that as a matter of English usage, prohibiting someone from accepting "any portion" or "any percentage" of a fee can be understood to prohibit

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[1] Quicken states in passing that it earned the loan discount fees because the fees were "a component of the price petitioners willingly paid in order to get the loans that they wanted." Resp. Br. 26. It also asserts in a footnote that loan discount fees are not charges for a "real estate settlement service," and therefore are not subject to RESPA. Resp. Br. 26 n.9. But Quicken does not assert either undeveloped argument as an alternative ground for affirmance. Nor does it contest petitioners' showing that these arguments were waived below. *See* Petr. Br. 9–11 nn.12–13. Both claims are meritless in any event. *See* U.S. Br. 28–32.

that person from accepting the entirety of the fee. *See* Resp. Br. 17.

Even if Quicken could show that the statute could be read differently, that would do it no good here – when a statute is susceptible to more than one reading, this Court defers to the reasonable interpretive choice made by the agency Congress charged with administering the statute. And in this case, the Department of Housing and Urban Development (HUD) construes the statute and the agency's notice-and-comment regulations as prohibiting all unearned fees, divided or not. Quicken therefore has its work cut out for it. It must either show that the statute does not bear HUD's construction or that there is some reason why the agency's reasonable view of its regulations and the statute should not prevail. Quicken has failed to do either.

I. RESPA's Text, Structure, And Purposes Preclude Quicken's Narrow Construction Of The Unearned Fee Provision.

While it is ultimately enough that HUD's interpretation of the statute is reasonable, in fact, HUD's interpretation is the one that best accounts for RESPA's language, structure, and purposes.

A. The Most Natural Reading Of Section 2607(b)'s Text Encompasses Undivided, Unearned Fees.

Quicken's defense of the court of appeal's contrary construction of the statutory language falls short.

1. *"No Person Shall Give And No Person Shall Accept"*

Quicken first asserts that "the plain meaning of Section 2607(b)'s opening words — 'No person shall give and no person shall accept' — contemplates the actions of two culpable actors," not a transaction between an innocent consumer and a culpable service provider. Resp. Br. 13. Quicken notes that it is more natural to speak of consumers *paying* charges, rather than *giving* them. And viewing consumers as potential "give[rs]" would mean that consumers themselves violate the statute when they acquiesce to demands for unearned charges. In the interest of protecting consumers, Quicken claims, the Court therefore must construe the statute to allow service providers to accept unearned fees so long as the source of the fee is a victimized consumer rather than a culpable service provider.

That conclusion makes no sense and nothing in the language of the statute compels it.

a. To avoid holding consumers liable, Quicken would have the Court read Section 2607(b) to provide "no person shall *culpably* give and no person shall *culpably* accept," or perhaps "no *service provider* shall give and no person shall accept," any portion of an unearned charge. But even if Congress had written the statute that way, Quicken still would have violated it, because it acted culpably when it accepted a charge for which it provided no actual service.

Quicken's only response is to argue that the word "and" requires that there be both a culpable giver and a culpable accepter in the same transaction. Resp.

Br. 13. That argument fails at its grammatical premise. In this context, the conjunction joins two independent prohibitions, saving Congress the trouble of having to repeat the direct object of the verbs "give" and "accept" (*i.e.*, "any portion, split, or percentage of any charge" relating to a federally insured mortgage) and the final clause of the sentence ("other than for services actually performed"). This formulation does not require that both prohibited acts occur in tandem for either culpable party to be liable.

For example, as petitioners have already pointed out, and Quicken simply ignores, a law stating that "no person shall send and no person shall accept child pornography" is most naturally read to prohibit the act of sending child pornography, even if no one ever accepts it because it got lost in the mail. Petr. Br. 14. And a statute providing that "no person shall knowingly make and no person shall knowingly accept" certain prohibited campaign contributions would be violated even if the giver did not act with the requisite culpability, so long as the candidate knew the donation was unlawful. *See* Petr. Br. 22.

Just as there can be an unlawful acceptance of a campaign donation even if there was no unlawful giving of the donation, there is nothing anomalous in finding that Quicken unlawfully accepted an unearned charge even if there was no unlawful giver in this case. Congress reasonably determined that when a consumer pays a settlement service charge, only those who have provided an actual service should share in any part of it. As a consequence, even if a consumer cannot violate the proscription

against giving unearned fees, a provider like Quicken can violate the ban on service providers accepting them.

b. Quicken is wrong, in any event, to argue that consumers cannot be considered *givers* of unearned fees because that would subject them to civil or criminal liability. Quicken concedes that consumers cannot be sued under RESPA's private right of action. *See* Resp. Br. 18 n.7; Petr. Br. 21 n.16. And although RESPA's criminal provision does not include an express mens rea element, *see* 12 U.S.C. § 2607(d)(1), "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" in a criminal case. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978); *see also Staples v. United States*, 511 U.S. 600, 605 (1994). As a result, consumers who give service providers unearned fees thinking that they are paying for services actually provided would not be subject to civil or criminal liability. *See Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 983 (11th Cir. 2003). And, of course, if consumers can be *givers* then Quicken violated the statute even under its interpretation of "and" because petitioners gave and Quicken accepted an unearned fee.

c. Quicken nonetheless insists that Congress was not referring to a payment from a consumer when it prohibited providers from accepting unearned fees. The statute, Quicken points out, prohibits accepting a charge "made" or "received" – past tense – for the rendering of a settlement service. Resp. Br. 20. This shows, Quicken says, that the prohibited giving and

accepting of unearned fees occur *after* the consumer has already paid the initial service provider. Therefore, Quicken reasons, the prohibition applies only to the subsequent disposition of the funds paid by the consumer, *i.e.*, through kickbacks to third parties. *Id.*

This argument fails because it is perfectly sensible to speak of Quicken *accepting* a charge that it previously *made*. First, a "charge" can refer to the demand for payment, which will be made prior to the consumer actually tendering, and a provider accepting, the fee. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 377 (unabr. 1981) (defining "charge" as "the price demanded for a thing or service"). That is the only sense in which a charge can be "made" – a consumer does not *make* a charge by paying money to a provider; the provider *makes* the charge by sending the consumer a bill. Second, even if a charge is "made" only when the consumer tenders the fee, the service provider must then decide whether to "accept" it – a provider would not violate the statute if it refused the tender of an unearned fee. Under either interpretation, reading the statute to prohibit undivided, unearned fees is consistent with the tense of the verbs "made" and "received."

d. Quicken is right to the extent it observes that the provision seems to contemplate the possibility of two transactions. Resp. Br. 18–21. But that simply reflects that Congress intended the provision to play a dual role, prohibiting both unearned charges to customers and kickbacks of charges between providers. To reach both situations, Congress reasonably chose broad, generic language that could

encompass both kinds of transactions. If Congress had provided that "[n]o charge shall be made in connection with the settlement other than for services actually performed," as Quicken suggests (*id.* 20), it would have failed to prohibit a great many kickbacks that arise when the initial service provider legitimately earns the charge paid by the consumer (say, a fee for title research) and then passes some or all of that charge along to another provider who did nothing to earn the kickback (say, a real estate agent who referred the client).

2. "Any Portion, Split, Or Percentage"

Quicken also claims that the phrase "any portion, split, or percentage" limits the provision to kickbacks, but it acknowledges that the terms "portion" and "percentage" can "include the entirety of something," Resp. Br. 35, and that Congress has used these terms in such a manner in other statutes, *id.* 36–37. Moreover, while Quicken argues that "portion" and "percentage" ordinarily refer to less than the whole, the statutory question here is whether someone who accepts the entirety of something thereby accepts "any portion" or "any percentage" of it. She does. For example, a school that declares that "no student shall give and no student shall accept any portion of another student's lunch money," has not left a loophole for the school bully to empty the smaller children's pockets. Likewise, a lab technician who insists that she "did not observe any portion" of a

test[2] is lying if, in fact, she observed the test from start to finish.

Quicken's interpretation would not make sense even if the provision were limited to kickbacks. If Section 2607(b) does not regulate the giving or accepting of the entirety of a fee, a provider would not be liable under that provision for giving a kickback to a third party so long as it kicked back the entirety of a charge.

B. The Structure Of Section 2607 Further Supports The Conclusion That Congress Intended The Provision To Address Both Kickbacks And Undivided, Unearned Fees.

It may seem incongruous that under HUD's interpretation, Section 2607(b) prohibits kickbacks as well as unearned fees, given that subsection (a) addresses kickbacks as well. But that unusual feature of the statute is unavoidable — Quicken's interpretation likewise results in kickbacks being prohibited by both subsections. *See* Resp. Br. 22. The only question is whether subsection (b) will play a significant independent role in the statute.

Under Quicken's interpretation, it will not. The only work subsection (b) does under Quicken's view is to prohibit kickbacks that are excluded from coverage under subsection (a) because they were not undertaken "pursuant to any agreement or

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[2] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

understanding." 12 U.S.C. § 2607(a); *see* Resp. Br. 22. Under this construction, subsection (b) exists only to fill a gap in coverage expressly created a sentence earlier in subsection (a). Why Congress would have not simply enacted a single provision without that gap, Quicken does not say.

Under HUD's view, subsection (b) plays a more meaningful role, prohibiting undivided, unearned fees that are not addressed in subsection (a). This interpretation affords each provision a more sensible independent focus, consistent with the Section title. *See* 12 U.S.C § 2607 (entitled "Prohibition against kickbacks *and* unearned fees") (emphasis added). While both provisions prohibit traditional kickbacks, subsection (a) is focused on the corrupting effect of referral relationships on the settlement market. It therefore makes no difference where the funds for the kickback come from, or what form the kickback takes. Subsection (b), in contrast, is focused on the charges imposed in particular transactions with consumers, protecting consumers from unearned fees and ensuring liability for any service provider that accepts any part of a charge unless the provider has earned it.

C. RESPA's Purposes Do Not Require Allowing Providers To Collect Unearned Fees So Long As They Keep Them For Themselves.

Quicken insists that Congress intended to permit false charges, so long as the provider keeps them for itself, because the purpose of the statute was to promote disclosure, not to regulate rates. And prohibiting providers from charging for services they

never performed, Quicken says, will inevitably lead to judicial rate setting. Not so.

1. RESPA Is Not Limited To Preventing Abusive Practices Through Disclosure Requirements.

There is no question that Congress intended RESPA's disclosure provisions to play an important role in reducing settlement costs. But requiring that the services listed on the disclosure forms actually be performed is entirely consistent with that purpose.

Quicken's principal evidence to the contrary is a negative inference it draws from the fact that Congress specifically mentioned disclosure and kickbacks in Section 2601(b), but not undivided unearned fees. But Section 2601(b) does not purport to catalog every prohibition in the statute. *See, e.g.*, 12 U.S.C. § 2608 (prohibiting sellers from requiring buyer's use of a specific title insurer); *id.* § 2610 (prohibiting fees for preparing federally required settlement statements). And in any event, the best evidence of what Congress intended to prohibit is the operative language of the statute, which is reasonably construed to extend to undivided, unearned fees as well.

Moreover, the measures subsection (b) does list belie any intent to protect consumers solely through disclosure requirements. For example, Congress did not address the problem of excessive escrow demands by simply requiring advance disclosure of escrow requirements, assuming that "[e]mpowered by this information, the consumer can [respond] . . . by shopping, comparing, and negotiating." Resp. Br. 39.

Instead, Congress directly limited the amount of money providers can require consumers to place in escrow. 12 U.S.C. § 2609.

Congress also directly prohibited kickbacks. *Id.* § 2607. Quicken says this makes sense because such "backroom deals between settlement service providers by their nature are not transparent to the consumer and impede the effectiveness of increased loan cost disclosure." Resp. Br. 1–2. But kickbacks are generally forbidden even if they are fully disclosed. *See* 12 U.S.C. § 2607(a), (c).[3]

2. *Prohibiting Undivided, Unearned Fees Does Not Inevitably Lead To Rate Regulation.*

Rather than make any serious attempt to explain why Congress would have intended to allow providers to pad their bills with false line items, Quicken and its amici focus instead on the straw man of overcharges, claiming that construing the statute to prohibit undivided, unearned fees would inevitably lead to a regime of judicial rate regulation. Nonsense.

First, prohibiting fraudulent fees does not amount to rate regulation by any stretch of the imagination. "When the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee — a task for which courts are not well suited — because the reasonable fee for nothing is nothing."

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[3] 12 U.S.C. § 2607(c)(4) permits some payments between affiliated businesses so long as they are disclosed.

Pet. App. 17a–18a (Higginbotham, J., dissenting). Thus, in this case, if Quicken gave petitioners discounts on their interest rates in exchange for their loan discount fees, that is the end of the case, even if the court might think that the price for the discounts was too high or the corresponding reduction in interest rate was too low.

Second, there is no basis for Quicken's claim that the split-requirement is the only thing standing between the industry and rate regulation. Indeed, it acknowledges that no court has yet fallen down that alleged slippery slope. Resp. Br. 41. To the contrary, every court of appeals that has interpreted Section 2607(b) to prohibit undivided, unearned fees has simultaneously rejected the proposition that the provision is violated simply because a provider has charged too much for a service actually provided. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 115 (2d Cir. 2007); *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 387 (3d Cir. 2005); *Sosa*, 348 F.3d at 983–84. Even if an unearned fee need not be split to violate the statute, it still must be *unearned*. And, these courts have held, a fee is earned so long as the defendant provided *some* service in exchange for the charge, even if the amount of the charge is unreasonably high.[4]

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[4] HUD has taken a contrary view. But accepting HUD's construction of the statute as reaching undivided, unearned fees would not compel the Court, in a future case, to accept HUD's position on the distinct question of whether excessive fees are unearned. *See Smith v. City of Jackson*, 544 U.S. 228, 247 (2005) (Scalia, J., concurring) (noting that even "simultaneously

3. Quicken's Interpretation Draws Arbitrary Distinctions Congress Could Not Have Intended.

Congress could not have intended RESPA to operate in the bizarre manner envisioned by Quicken. Under its view, providers may charge and keep the entirety of a $1,000 unearned fee but face criminal prosecution if they share even a nickel of a $10 fee with someone else; unless they give that third party the *entirety* of the unearned charge, in which case they have not violated the statute either because they have not split the fee. It is therefore unlawful to share either too much or too little of a fee with third parties, but Congress provided a safe harbor for the selfish cheat who keeps all the ill-gotten gains for itself.

The irrationality of the lines the Court must draw to reject HUD's interpretation is reason enough to reject Quicken's. It is far more sensible to believe that Congress intended to shield consumers from all unearned fees, divided or not, given that the object of the statute was to protect consumers from abusive practices and unnecessarily high settlement costs.

D. Quicken's Reliance On Legislative History And The Rule Of Lenity Is Misplaced.

Looking beyond the text and purposes of the statute, Quicken seeks assistance from the legislative

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adopted interpretations [that] appear in the same paragraph" of a regulation need not "stand or fall together").

history and the rule of lenity, but neither provides it much help.

1. It is the "rare case[]" in which legislative history so decisively resolves a statutory ambiguity that there is no room left for a contrary agency interpretation of the statute. *Zuni Public Sch. Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 104–05 (2007) (Stevens, J., concurring). This is not one of them. Most of Quicken's citations simply show that kickbacks were a significant concern, which petitioners do not contest. *See* Resp. Br. 28–34. Nonetheless, both the House and Senate Committee Reports treated unearned fees as an abusive practice distinct from kickbacks. *See* S. Rep. No. 93-866, at 1 (1974) (explaining that statute was intended to "eliminate the payment of kickbacks *and* unearned fees") (emphasis added); H.R. Rep. No. 93-1177, at 4 (1974) (describing statute as designed to regulate "abusive practices, such as kickbacks, unearned fees, and unreasonable escrow accounts"). That undivided, unearned fees did not receive more significant discussion is hardly a basis to conclude that the statute unambiguously excludes them from regulation.

Other than that silence, the only evidence Quicken points to as establishing an affirmative intent to leave undivided, unearned fees unregulated is the statement of a single member of the House of Representatives, entered into the record *after* the House had already enacted the bill. Resp. Br. 32 (quoting 120 Cong. Rec. 29,442-43 (Aug. 20, 1974) (statement of Rep. Blackburn)). "Whether the floor statements are spoken where no [member of

Congress] hears, or written where no [member] reads, they represent at most the views of a single" Congressman. *Hamdan v. Rumsfeld*, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting).

2. Quicken's reliance on the rule of lenity as an alternative to *Chevron* deference is also misplaced. This Court has "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995); *see also, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (looking to agency interpretation in construing statute rather than applying the rule of lenity). The fair notice objective of the rule of lenity is fully realized when statutory ambiguity is resolved by an authoritative administrative interpretation. In any event, while there may be room for administrative interpretation, the statute is not so grievously ambiguous as to trigger the rule of lenity. *See, e.g., Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (citation and internal quotation marks omitted).

II. Any Ambiguity Should Be Resolved By Deferring To HUD's Reasonable Construction Of The Statute.

At best, Quicken's arguments may show that RESPA is ambiguous. But Congress assigned HUD responsibility for resolving any ambiguities in the

statute, and that agency has repeatedly made clear that it construes the statute to prohibit unearned fees, even if providers keep the fraudulent charges entirely for themselves. That interpretation merits *Chevron* deference, both as expressed in HUD's 1992 notice-and-comment regulation and its 2001 Statement of Policy.

A. HUD's Notice-And-Comment Regulation Merits *Chevron* Deference.

Deference is due first and most obviously to HUD's notice-and-comment regulation, which states that a "charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c). HUD confirms that it construes this regulation to prohibit unearned fees even if they are not divided. U.S. Br. 24. Quicken thus is forced to argue that HUD has misconstrued the regulation or that the regulation as construed by HUD does not warrant *Chevron* deference. Neither claim succeeds.

1. *HUD's Interpretation Of The Regulation Is Controlling.*

Three times last term, this Court reaffirmed that under *Auer v. Robbins*, 519 U.S. 452 (1997), the Court "defer[s] to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Talk Am., Inc. v. Mich. Bell Tel. Co.*,

131 S. Ct. 2254, 2261 (2011) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011)); *see also PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011).[5] Accordingly, Quicken must show not only that its interpretation of the regulation is the better one, but that HUD's interpretation of the regulation is clearly wrong.

Quicken does not even claim that HUD's interpretation of the pertinent sentence of the regulation is impermissible. It argues, instead, that "the better view" is that the sentence merely defines what it means for a fee to be unearned and does not purport to state that such unearned fees, in themselves, violate the statute. Resp. Br. 47–48. But that is *exactly* what the regulation says – "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee *and violates this section*." 24 C.F.R. § 3500.14(c) (emphasis added).[6] Quicken simply ignores the final clause.

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[5] In a single sentence, Quicken suggests that the Court rethink this recent precedent. Resp. Br. 60. But it does not develop the argument to any degree that would allow a considered reevaluation of the Court's half-century-old doctrine. Accordingly, this case does not present an appropriate occasion to consider the questions raised in Justice Scalia's concurrence in *Talk America, Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

[6] Of course, the "charge" to which the sentence refers is a charge for a settlement service connected to a federally related mortgage, a point that is obvious on the face of the statute and required no reiteration.

Instead, Quicken relies on the subtitle of the regulation, which refers to split charges. Resp. Br. 45. While subtitles may be helpful in resolving ambiguity in the body of a regulation, they are not a basis for introducing an ambiguity into the otherwise clear text of the regulation itself. In any event, as HUD has explained, the "rule headings and preamble text are a generalized description of Section [2607]" and do not purport to define the full scope of any given provision. 66 Fed. Reg. 53,052, 53,057 n.4 (Oct. 18, 2001). The subtitle is accurate as far as it goes – the regulation does prohibit unearned splits, which were a substantial focus of the statute. But that is not the only thing the regulation prohibits and nothing in the title says otherwise.

Quicken then turns to the text of a *different* regulation, which provides that HUD may investigate high prices for evidence of illegal referral fees or fee splitting, but makes no mention of undivided, unearned fees. Resp. Br. 46. The failure to mention unearned fees, however, may simply show that HUD believed that the mere fact a fee is high does not indicate that the provider did nothing to earn it. In contrast, a provider intent on splitting a fee may very well raise its prices to pass the cost of the kickback on to the consumer.

As a last resort, Quicken points to a sentence in the Notice of Final Rule that says "HUD reorganized this section [24 C.F.R. § 3500.14] and added some language to clarify what constitutes payments and services for purposes of Section [2607]." 57 Fed. Reg. 49,600, 49,605 (Nov. 2, 1992). HUD appears, however, not to be referring to the subsection at issue

here (which Quicken itself claims is addressing whether a fee is *earned*, not what constitutes a "payment" or a "service"). Instead, it appears to refer to other parts of the amended regulation that do define the term "payment" and address "services." *See* 24 C.F.R. § 3500.14(d) (defining the term "payment"); *id.* § 3500.14(g)(3) (addressing "multiple services").

At most, Quicken's arguments may draw into question whether HUD really meant what it said when it declared that an unearned fee "violates this section." 24 C.F.R. § 3500.14(c). But HUD has told this Court that it did, and there is nothing so incongruous about that interpretation as to justify withholding deference to HUD's construction of its own regulation.

2. The Regulation Warrants Chevron *Deference.*

Quicken briefly runs through a litany of reasons why the regulation, even if properly construed to prohibit undivided, unearned fees, is not subject to *Chevron* deference. None has merit.

First, Quicken says that *Chevron* does not apply because the regulation reflects a "legal judgment" rather than a "policy judgment." Resp. Br. 50. Even if that were a basis for denying *Chevron* deference, it has no application here. Deciding whether Section 2607(b) encompasses undivided, unearned fees necessarily entails an exercise of policy judgment, including determining whether the purposes of the statute are adequately served by disclosure alone; whether prohibiting undivided, unearned fees is

necessary to end the abuses Congress targeted; and whether implementation of that prohibition is feasible and desirable in this industry. Indeed, Quicken and its amici spend a significant portion of their briefing laying out a policy rationale for limiting the Act to prohibiting kickbacks. Resp. Br. 38–39; Br. Am. Bankers' Ass'n et al. as Amici Curiae in Support of Respondent 19–21.

Second, Quicken argues the regulation is "procedurally defective" because the final rule "set forth a new theory of liability" that was not "reasonably foreseeable" from the notice of proposed rulemaking. Resp. Br. 50–51. The statute of limitations for bringing a challenge to the procedural adequacy of the rule expired years ago. *See, e.g.*, *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (statute of limitations for notice-and-comment challenge is six years) (citing 28 U.S.C. § 2401); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1286-87 (5th Cir. 1997) (same). "[C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [limitations] period provided by statute." *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (emphasis in original); *see also, e.g.*, *Sai Kwan Wong*, 571 F.3d at 263 (same). Accordingly, although *Chevron* deference is not afforded to procedurally defective rules, the procedural regularity of HUD's regulation is now no longer open to challenge.

But even assuming *Chevron* provides affected parties a second chance to raise otherwise untimely procedural objections to a regulation, Quicken's complaint has no merit. The Administrative Procedure Act (APA) requires an agency to give notice of "*either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (emphasis added). HUD did both. It advised the public that it would be making "changes to improve the clarity of the current regulations," 53 Fed. Reg. 17,424 (May 16, 1988), and solicited comments "on any matters related to Regulation X." The then-current version of the regulations simply restated the language of Section 2607(b), so there was every reason for commenters to understand that the final rule might provide additional clarification on the meaning of the provision. The final rule's codification of HUD's long-standing interpretation of the statute as prohibiting undivided, unearned fees should have taken no one by surprise and was a "logical outgrowth" of the original proposal. *Long Island Care at Home, Ltd v. Coke*, 551 U.S. 158, 174 (2007).

Finally, Quicken argues that "HUD's failure to give any explanation for [its] interpretation of Section 2607(b)" renders its interpretation "arbitrary and capricious." Resp. Br. 51. That argument adds nothing to the analysis, as this Court has recently explained that "judicial review of an agency's statutory interpretations" is governed by *Chevron*, the second step of which fully implements the "arbitrary and capricious" standard of the APA. *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011);

see also Mayo Found. for Med. Educ. and Research v. United States, 131 S. Ct. 704, 711–12, 714 (2011). In any event, the agency's explanation of the regulation has been more than adequate. *See, e.g.*, U.S. Br. 13–23; 57 Fed. Reg. 49,600, 49,600 (Nov. 2, 1992) (notice of final rule, explaining that HUD was "taking the opportunity to . . . incorporate in this regulation certain matters which were previously only covered by informal legal or program advice"); 66 Fed. Reg. 53,052, 53,057 n.3 (Oct. 18, 2001) (collecting prior informal opinions expressing view that RESPA prohibits all unearned fees); *id.* at 53,057-59 (HUD 2001 Statement of Policy addressing unearned fees).

B. HUD's 2001 Statement Of Policy Independently Warrants *Chevron* Deference.

Quicken does not dispute that even if the regulations are ambiguous, HUD's 2001 Statement of Policy is not. Instead, Quicken argues only that the Statement of Policy is not the kind of agency interpretation that qualifies for *Chevron* treatment and that it is insufficiently persuasive to warrant deference under any lesser standard. Both assertions are wrong.

1. Quicken argues that the Statement of Policy does not carry the force of law because it is an "interpretative rule" within the meaning of the APA and therefore was not required to undergo notice and comment. Resp. Br. 52. But interpretive rules, while not granted *Chevron* deference "as a class," *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001), are not categorically precluded from *Chevron* deference either, *see, e.g.*, *Barnhart v. Walton*, 535 U.S. 212,

221 (2002) (explaining that lack of notice-and-comment procedures "does not automatically deprive that interpretation of the judicial deference otherwise its due"). To be sure, a great many interpretive rules do not qualify for *Chevron* deference. For example, the agency issuing an interpretive rule may not administer the statute in the *Chevron* sense. *See, e.g.*, *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (noting that the Attorney General does not administer criminal laws within the meaning of *Chevron*); *cf.* Resp. Br. 54.

But if interpretive rules were categorically excluded from *Chevron* treatment, this Court's decision in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), would have been considerably shorter. In that case, as Justice Scalia noted, the Court did "not take issue with the Solicitor General's contention that no alleged procedural defect, such as the absence of notice-and-comment rulemaking before promulgation of the [Attorney General's] Directive, renders *Chevron* inapplicable here." *Id.* at 281 (Scalia, J., dissenting). Instead, the Court engaged in an extensive inquiry into whether the Attorney General's interpretation addressed a question within the scope of the limited lawmaking authority Congress had delegated to him under the Controlled Substances Act. *Id.* at 258–68. That inquiry would have been entirely unnecessary if, as Quicken argues, interpretive rules are categorically disqualified from receiving *Chevron* deference.

2. In this case, there is ample basis to conclude that Congress would have intended HUD's official

interpretations to carry the force of law. *See* Petr. Br. 35–41.

That conclusion is confirmed by the provision of a safe harbor defense for acts undertaken in reliance on HUD's interpretations as well as its regulations. *See* 12 U.S.C. § 2617(b); Petr. Br. 36; U.S. Br. 26–27. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), this Court noted that a materially indistinguishable provision of the Truth in Lending Act "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." *Id.* at 568. Quicken acknowledges the logic of *Ford*, but attempts to distinguish it on the ground that the decision "preceded much of the modern law as to administrative deference." Resp. Br. 55 n.23. But if anything, the Court's subsequent decisions in *Chevron* and its progeny have only expanded the scope of administrative deference. *See, e.g.*, *Christensen v. Harris Co.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring in part and concurring in the judgment). Moreover, like the agency in *Ford*, HUD was "directly involved in the creation of the law and had been delegated 'broad administrative lawmaking power' by Congress." Resp. Br. 55 n.23; *see id.* 28 (RESPA enacted in response to congressionally ordered report from HUD); 12 U.S.C. § 2617(a) (authorizing HUD to issue regulations and interpretations "as may be necessary to achieve the purposes of this Act"). Quicken argues that if "Congress intended that HUD's interpretations would *be* the law, it would not have been necessary to provide immunity for good faith compliance with

them." Resp. Br. 54 (emphasis in original). But the provision itself answers that argument, providing a defense even if an "interpretation is amended, rescinded, or determined by judicial or other authority to be invalid." 12 U.S.C. § 2617(b).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Harvard Supreme Court Litigation Clinic

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AMICUS CURIAE BRIEF

No. 10-1042

In the Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Real Estate Settlement Procedures Act of 1974 provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. 2607(b). The question presented is as follows:

Whether, to establish a violation of Section 2607(b), a plaintiff must demonstrate that an unearned fee for a real estate settlement service was divided between two or more persons.

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INTEREST OF THE UNITED STATES

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, is a consumer-protection statute that prohibits, *inter alia*, giving and accepting "any portion, split, or percentage of any charge" for a settlement service "other than for services actually performed." 12 U.S.C. 2607(b). Congress authorized the Department of Housing and Urban Development (HUD) to administer RESPA, and to "prescribe such rules and regulations" and "make such interpretations" as are "necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a).

HUD consistently interpreted Section 2607(b) to prohibit all unearned fees, regardless of whether such fees are divided between two or more parties. Earlier this

year, HUD's consumer-protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (CFPB), and the CFPB has adopted HUD's longstanding interpretation of Section 2607(b).

Unearned fees disserve RESPA's purposes by increasing settlement costs and potentially putting home ownership beyond the reach of many Americans. The United States therefore has a substantial interest in the resolution of the question presented. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted RESPA to ensure that "consumers * * * are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). To that end, RESPA includes a "[p]rohibition against kickbacks and unearned fees." 12 U.S.C. 2607. Subsections (a) and (b) of Section 2607 prohibit two distinct forms of abusive conduct related to the provision of real estate settlement services.[1]

Section 2607(a) addresses kickbacks and provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that

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[1] RESPA defines "[s]ettlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, and "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." 12 U.S.C. 2602(3).

> business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. 2607(a).[2] Section 2607(b) addresses unearned fees and provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. 2607(b). RESPA also emphasizes, however, that "[n]othing in [Section 2607] shall be construed as prohibiting" certain payments and practices, such as "the payment to any person of * * * compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2).[3]

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[2] The criteria for identifying "federally related" mortgage loans are set forth in 12 U.S.C. 2602(1).

[3] RESPA authorizes enforcement of Section 2607 through, *inter alia*, criminal prosecutions and actions for injunctive relief brought by the CFPB, HUD, or the Attorney General or insurance commissioner of any State. 12 U.S.C. 2607(d)(1) and (4); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 1098, 124 Stat. 2038, 2103-2104. Private parties may also bring actions for damages to remedy kickback and unearned-fee violations. 12 U.S.C. 2607(d)(2). The Court has granted certiorari on the question whether an individual who brings suit under Section 2607(d)(2) for an alleged kickback violation has standing to sue under Article III in the absence of an allegation that the kickback affected the price, quality, or other characteristics of the settlement services provided. See *First Am. Fin. Corp.* v. *Edwards*, No. 10-708 (argued Nov. 28, 2011). Because petitioners in this case allege that they were charged unlawful fees, and thus

b. Congress authorized HUD to administer RESPA. Section 2617(a) authorized HUD to "prescribe such rules and regulations" and "make such interpretations" as are "necessary to achieve the purposes of [RESPA]." HUD's regulations promulgated under that authority are codified at 24 C.F.R. Pt. 3500. In addition, under 24 C.F.R. 3500.4(a)(1)(ii), policy statements published by HUD in the *Federal Register* are "official interpretations" of RESPA pursuant to Section 2617(a) "upon which the public may rely." 57 Fed. Reg. 49,604 (1992).

On July 21, 2011, HUD's consumer-protection functions relating to RESPA were transferred to the CFPB. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. On the same date, the CFPB issued a notice stating that it would enforce HUD's RESPA regulations, 24 C.F.R. Pt. 3500, and that, pending further CFPB action, it would also apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

c. HUD consistently interpreted Section 2607(b) to prohibit all unearned fees, regardless of whether those fees are divided between two or more people. For example, HUD's 1975 consumer information booklet, required by 12 U.S.C. 2604, advised that "[y]ou should be charged only for services actually performed." 40 Fed. Reg. 22,459 (1975). HUD's 1976 booklet explained that, in addition to RESPA's prohibition of kickbacks, "[i]t is also illegal to charge or accept a fee or part of a fee

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that the RESPA violation affected the price of the settlement services they received, the standing question presented in *Edwards* is not implicated here.

where no service has actually been performed." 41 Fed. Reg. 20,289 (1976).

In 1992, after notice-and-comment rulemaking, HUD adopted a regulation stating that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [Section 2607]." 24 C.F.R. 3500.14(c). HUD reiterated that interpretation in other rulemakings. See, *e.g.*, 61 Fed. Reg. 29,249 (1996) ("[N]o person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. * * * [T]wo persons are not required for [Section 2607(b)] to be violated.").

In 2001, in response to the Seventh Circuit's decision in *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623 (2001), HUD issued a policy statement indicating that HUD "specifically interprets [Section 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." 66 Fed. Reg. 53,057.[4] The policy statement gave four non-exclusive examples of unearned fees:

> (1) [t]wo or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one

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[4] In *Echevarria*, the Seventh Circuit held that Section 2607(b) is violated only when two or more parties split an unearned fee. 256 F.3d at 626-627. The court suggested, however, that it might reconsider its holding in a future case if HUD were to make "a formal commitment * * * to an opposing position." *Id.* at 630.

> service provider charges the consumer a fee where no, nominal, or duplicative work is done, or [(4)] the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

Ibid. The policy statement explained that, because the "proscription [in Section 2607(b)] against 'any portion, split, or percentage' of an unearned charge for settlement services is written in the disjunctive, the prohibition is not limited to a split." *Id.* at 53,058. Thus, Section 2607(b) "forbids the paying or accepting of any portion or percentage of a settlement service [charge]—including up to 100%—that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person." *Ibid.*

d. RESPA further required HUD, in consultation with certain other federal officials, to "develop and prescribe a standard form for the statement of settlement costs," which "shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement." 12 U.S.C. 2603(a). To carry out that statutory mandate, HUD developed a uniform settlement statement known as the "HUD-1" form. That form requires disclosure, "[f]or each separately identified settlement service in connection with the transaction," of "the name of the person ultimately receiving the payment" and "the total amount paid to such person." 24 C.F.R. Pt. 3500, App. A; see 24 C.F.R. 3500.8.

2. Petitioners obtained mortgage loans from respondent Quicken Loans, Inc. Petitioners allege that respondent charged them fees for which no services were provided, in violation of Section 2607(b). Specifically, the Freemans and the Bennetts allege that they were charged loan discount fees of $980 and $1100, respec-

tively, but that respondent did not give them lower interest rates in return. Pet. App. 20a-21a & n.2, 22a & n.6; J.A. 8-9 (Freeman Compl. paras. 5-6); J.A. 28 (Bennett Compl. paras. 6-7). The Smiths allege that they were charged a "loan origination" fee of more than $5100, as well as a $575 loan "processing fee," and that "no, nominal or duplicative service was provided" in connection with the loan origination fee. Pet. App. 21a-22a & n.4; J.A. 78-79 (Smith Compl. paras. 5, 7).

Petitioners filed separate actions in state court. Respondent removed the suits to federal court, where the cases were consolidated. Pet. App. 3a. Respondent moved for summary judgment on the ground that petitioners' claims are not cognizable under Section 2607(b) because the allegedly unearned fees were not split with another party. *Id.* at 23a-24a.

3. The district court granted summary judgment for respondent. Pet. App. 19a-70a. The court concluded that Section 2607(b) does not "provide[] a claim in a situation where a single settlement services provider retains unearned fees," *id.* at 43a, because "the plain language of Section [2607(b)] requires an allegation that the challenged fees have been split in some fashion," *id.* at 66a (emphasis omitted). Because petitioners did not contend that respondent had split the allegedly unearned loan discount fees with another party, *id.* at 66a, 69a, the court concluded that no violation of Section 2607(b) had occurred, *id.* at 67a, 69a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

a. The court of appeals concluded that Section 2607(b) does not prohibit the acceptance of undivided unearned fees. Pet. App. 7a. First, the court stated that the language of Section 2607(b)—"[n]o person shall give and no person shall accept"—indicates that Congress

was "aiming at an exchange or transaction, not a unilateral act." *Ibid.* (quoting *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002)). Second, the court explained that RESPA's anti-kickback provision, which states that "[n]o person shall give and no person shall accept" a kickback, 12 U.S.C. 2607(a), "clearly requires two culpable actors." Pet. App. 8a. The court inferred that, to be consistent with that provision, Section 2607(b) "should require two culpable actors as well." *Ibid.*

Third, the court determined that the language "any portion, split, or percentage" in Section 2607(b) "requires that two parties share something," because "[t]he definitions of all three words require less than 100% or the whole of something." Pet. App. 8a-9a. Finally, the court explained that, "when read in its entirety, RESPA is an anti-kickback statute." *Id.* at 10a. The court noted that the statute's "purpose" section "explicitly and exclusively prohibits kickbacks and referral fees," but does not mention "a general prohibition on * * * unearned fees or other forms of price abuse." *Ibid.* (emphasis omitted).

The court of appeals concluded that because Section 2607(b) is "clear on its face," the court had "no need to look to any regulatory interpretation, such as the HUD 2001 [policy] statement." Pet. App. 12a (citation omitted). The court also stated that the HUD policy statement did not have the "force of law" because it had not been adopted through notice-and-comment rulemaking, and that the court found the policy statement "unpersuasive" in any event. *Id.* at 12a-13a (citation omitted).

b. Judge Higginbotham dissented. Pet. App. 15a-18a. He concluded that the phrase "any portion, split, or percentage of any charge . . . other than for services

actually performed" is ambiguous with respect to Congress's intent to prohibit undivided unearned fees. *Id.* at 17a. In his view, "[p]rohibiting such fees strikes at a core objective of RESPA: promoting transparency of costs associated with settlement" and "reducing abuses by those in the mortgage industry through charging borrowers fees for work not actually performed." *Ibid.* Judge Higginbotham further explained that adopting this interpretation "would not lead * * * to a rate-setting regime" because "the reasonable fee for nothing is nothing," and thus, "[w]hen the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee." *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

A. 1. a. Section 2607(b) provides that "[n]o person shall give and no person shall accept" any unearned settlement charges. 12 U.S.C. 2607(b). By its plain terms, the text of Section 2607(b) prohibits two separate actions: giving an unearned fee, and accepting an unearned fee. Thus, giving an unearned portion of a charge is prohibited even if there is no culpable acceptor, and accepting an unearned charge is prohibited even if there is no culpable giver. Although violations of Section 2607(b) typically involve transactions between two (or more) parties rather than wholly unilateral conduct, Section 2607(b) does not require that both parties be culpable actors. Rather, Section 2607(b) unambiguously covers the acceptance of unearned fees from the consumer herself.

Section 2607(d) provides further textual support for the conclusion that Section 2607(b) prohibits the acceptance of unearned fees, even if those fees are not shared with another party. Section 2607(d) prescribes penalties

for the "*person or* persons" who violate RESPA's prohibitions on kickbacks and unearned fees, showing that a single culpable party can violate Section 2607(b).

b. The text of RESPA's anti-kickback provision, 12 U.S.C. 2607(a), does not support the court of appeals' conclusion that a violation of Section 2607(b) requires two or more culpable parties. Although Section 2607(a) contains the same "[n]o person shall give and no person shall accept language" as Section 2607(b), Section 2607(a) prohibits payment and acceptance of kickbacks "pursuant to any agreement or understanding * * * that business * * * shall be referred to any person." It is the requirement of an "agreement or understanding," not the "[n]o person shall give and no person shall accept" language, that specifically requires two culpable parties; and that requirement has no counterpart in Section 2607(b).

c. Section 2607(b)'s reference to "any portion, split, or percentage" also does not suggest that two culpable parties must share an unearned fee in order to violate that provision. Although the term "split" is commonly understood to mean that something is shared between two or more people, "portion" and "percentage" do not have the same connotation. The canon of construction *noscitur a sociis*, which states that terms in a list should be given related meanings, does not apply here. Section 2607(b)'s reference to "portion, split, or percentage" is written in the disjunctive, and the words are not so similar that they should be construed in a way that deprives any individual term of its common meaning. Section 2607(b)'s broad language makes clear that a settlement service provider cannot escape liability by sharing an unearned fee with another culpable party, but it does

not suggest that the fee *must* be divided in that manner in order for liability to attach.

d. The court of appeals' interpretation would lead to absurd results. There is no plausible policy rationale for immunizing a settlement services provider's acceptance of an unearned mark-up, or a fee for a service that has not been provided, simply because the provider keeps the entire fee for itself rather than sharing it with another culpable party.

2. RESPA's purpose to protect consumers from unnecessarily high settlement charges caused by abusive practices further supports the conclusion that Section 2607(b) prohibits undivided, unearned fees. Although the list of RESPA's purposes set forth in Section 2601(b) specifically refers to kickbacks but not to unearned fees, that omission from the statute's "purpose" section is irrelevant given Section 2607(b)'s unambiguous prohibition of accepting unearned fees. RESPA's legislative history confirms that Congress was concerned with abusive settlement practices, such as unearned fees, in addition to kickbacks.

B. Any ambiguity in the text of Section 2607(b) has been resolved by HUD's regulation and policy statement interpreting that provision, which are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

Congress authorized HUD to promulgate "rules and regulations" and to make "interpretations" that are necessary to achieve RESPA's purposes. 12 U.S.C. 2617(a). HUD used both of those interpretive mechanisms to clarify the scope of Section 2607(b). HUD determined through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed" is an unearned fee and violates Section

2607(b). 24 C.F.R. 3500.14(c). HUD also issued an official interpretation in the form of a policy statement, which specifically states that Section 2607(b) prohibits all unearned fees, regardless of whether they are shared. HUD's interpretations are based on a permissible construction of the statute, and they are entitled to controlling weight under *Chevron*.

C. 1. Under a correct interpretation of Section 2607(b), respondent was not entitled to summary judgment. Some of the petitioners in this case allege that respondent charged them loan discount fees without providing a corresponding reduction in their interest rates, and other petitioners allege that respondent charged them a loan origination fee that was duplicative of a loan processing fee that they had also been charged at settlement. If petitioners can prove those allegations, respondent violated Section 2607(b) by accepting a "portion * * * or percentage" of the fees that petitioners were charged, without "actually perform[ing]" any services in return. 12 U.S.C. 2607(b). For purposes of Section 2607(b), it is irrelevant that respondent retained the entire amount of those fees, rather than splitting the fees with another person.

2. The Court should not affirm the court of appeals' decision based on the alternative grounds that respondent asserts support the judgment below. Respondent contends that loan discount fees are not fees for settlement services, and that the fees in this case were earned. The courts below did not decide those issues, and they will remain open on remand if this Court holds that Section 2607(b) encompasses undivided unearned fees.

In any event, respondent's alternative contentions lack merit. RESPA's definition of "[s]ettlement ser-

vices" (12 U.S.C. 2602(3)) includes the originating, underwriting, and funding of loans, and HUD's settlement forms include a line-item to indicate points for the specific interest rate chosen. A loan discount fee is thus a charge for a "settlement service" under RESPA. Similarly, the fees in this case were not earned simply because they bore some connection to a settlement service (loan funding) that respondent actually performed. A discount fee that procures no actual interest-rate reduction is a fee "other than for services actually performed." 12 U.S.C. 2607(b).

ARGUMENT

A PERSON WHO ACCEPTS AN UNEARNED FEE FOR A REAL ESTATE SETTLEMENT SERVICE VIOLATES SECTION 2607(b) REGARDLESS OF WHETHER THE UNEARNED FEE IS DIVIDED BETWEEN TWO OR MORE CULPABLE ACTORS

A. Section 2607(b) Prohibits The Acceptance Of Undivided Unearned Fees

1. Section 2607(b) unambiguously prohibits the acceptance of an unearned fee for rendering a real estate settlement service, whether or not the fee is shared with any other culpable actor

a. Determining the scope of Section 2607(b) "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Section 2607(b) states that "[n]o person shall give and no person shall accept" any unearned settlement charges. 12 U.S.C. 2607(b). As used in Section 2607(b), the word "and" is a "coordinating junction" that "link[s] independent ideas." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct.

1068, 1078 (2011); see *Ron Pair*, 489 U.S. at 241 (phrase preceding "and" is "independent of the language that follows"). A statute providing that "no person may purchase and no person may sell heroin" would clearly prohibit two distinct acts: buying heroin and selling it. By its plain terms, Section 2607(b) similarly prohibits two separate actions: giving an unearned fee, and accepting an unearned fee.

To be sure, because a person who "accepts" money typically accepts it *from* someone else, a violation of Section 2607(b) will ordinarily involve a "transaction" rather than a purely "unilateral act." Pet. App. 7a (quoting *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002)). In this case, petitioners allege that respondent "accept[ed]" the unearned fees from petitioners themselves, the alleged victims of the Section 2607(b) violation. Cf. 12 U.S.C. 2607(d)(2) (providing that any person who violates Section 2607(b) "shall be * * * liable to the person or persons charged for the settlement service involved in the violation"). Because Section 2607(b)'s prohibition on the "accept[ance]" of unearned settlement charges is not limited to fees accepted from any particular category of persons, the prohibition unambiguously covers acceptance of such charges from consumers.

In concluding that respondent's alleged acceptance of unearned fees from petitioners did not violate Section 2607(b), the court of appeals did not simply read that provision to require a transaction between two different persons. Rather, the court imposed the further requirement that "two *culpable* actors" must participate in the violation. Pet. App. 8a (emphasis added). The ordinary understanding of the verb "accept" provides no support for that construction of the statute. Thus, although a

sale of heroin requires both a buyer and seller, the hypothetical statute described above would unambiguously cover a person who sold heroin to (or purchased heroin from) an undercover law-enforcement agent, even though the agent himself would not be a culpable party. Similarly under Section 2607(b), "[g]iving a portion of a charge is prohibited regardless of whether there is a culpable acceptor, and accepting a portion of a charge is prohibited regardless of whether there is a culpable giver." *Sosa* v. *Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003).

In some circumstances, two or more culpable persons may violate Section 2607(b) with respect to the same unearned fee, as when two or more persons share the unearned portion of a charge for a settlement service. See 66 Fed. Reg. at 53,057. Nothing in the statute's text, however, limits violations to that scenario and *requires* two or more culpable actors for every violation. The court of appeals' interpretation of Section 2607(b) is particularly misconceived because it would make liability for "accept[ing]" an unearned fee contingent on the recipient's subsequent disposition of the money. Under the court of appeals' approach, respondent could potentially have been held liable if, after charging the fees at issue in this case, it had shared the money with another culpable actor. There is no plausible textual rationale for concluding that an initially lawful "accept[ance]" of money can be rendered unlawful by events that occur after the fee has been accepted.

Section 2607(b)'s prohibition of undivided unearned fees is further reflected in the text of Section 2607(d). That provision establishes penalties for the "*person or* persons" who violate RESPA's provisions prohibiting kickbacks and unearned fees in connection with real

estate settlement services. 12 U.S.C. 2607(d)(1), (2), and (3) (emphasis added). Section 2607(d) thus reinforces the conclusion that a violation of Section 2607(b) can involve a single culpable actor.

b. In construing Section 2607(b) to require two culpable parties, the court of appeals relied in part on RESPA's anti-kickback provision, 12 U.S.C. 2607(a). The court explained that Section 2607(a) contains the same "[n]o person shall give and no person shall accept" language as Section 2607(b), and that Section 2607(a) "clearly requires two culpable actors." Pet. App. 8a. The court inferred from those features of Section 2607(a) that Section 2607(b) requires two culpable actors as well. *Ibid.* That inference is unwarranted.

Section 2607(a) prohibits the payment and acceptance of "any fee, kickback, or thing of value *pursuant to any agreement or understanding* * * * that business * * * shall be referred to any person." 12 U.S.C. 2607(a) (emphasis added). It is the language italicized above, rather than the "[n]o person shall give and no person shall accept" language in Section 2607(a), that specifically requires two culpable parties. By contrast, Section 2607(b) contains no reference to any "agreement or understanding," and it prohibits different conduct that does not require two or more culpable participants.

One important respect in which the two prohibitions differ concerns the likely payor of the two types of fees. Although kickbacks and referral fees may have the ultimate effect of increasing the cost to consumers of settlement services, a kickback is typically paid by one settlement service provider to another, rather than by the consumer herself. By contrast, as the allegations in this case reflect, "charges made or received for the rendering of a real estate settlement service * * * other than

for services actually performed," 12 U.S.C. 2607(b), are often paid directly by the consumer. To read into Section 2607(b) the limitations associated with kickbacks and referral fees would thus reduce arbitrarily the provision's coverage and its effectiveness in combating abusive settlement-service practices.

c. In concluding that a violation of Section 2607(b) requires two culpable parties, the court of appeals read the statute's reference to "any portion, split, or percentage of any charge," 12 U.S.C. 2607(b), to "require[] that two parties share something." Pet. App. 8a. That reading of the statute is incorrect.

i. Because RESPA does not define "portion," "split," or "percentage," it is appropriate to consider the "ordinary usage" of those terms. *FCC* v. *AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011). Although common usage suggests that a "split" of a charge is a fee shared by two or more persons, the terms "portion" and "percentage" need not have the same connotation. Section 2607(b)'s broad language makes clear that a settlement service provider *can* be held liable for accepting less than the whole of an unearned fee—*i.e.*, that it cannot escape liability by sharing the fee with another culpable party. Section 2607(b) does not suggest, however, that the unearned fee *must* be divided in that manner in order for liability to attach.

A person can accept a "portion * * * of any charge" that is not "for services actually performed," without sharing that unearned fee with any other party. 12 U.S.C. 2607(b). If at settlement a lender charges the consumer $100 for an appraisal provided by a third party, but the third party's actual charge for the appraisal was $75 and the lender retains the extra $25 without providing any additional service, the lender has

violated RESPA's plain terms. Under those circumstances, the lender has accepted a "portion" of a "charge" for a settlement service (*i.e.*, the $25 mark-up) "other than for services actually performed," 12 U.S.C. 2607(b), even though no other culpable party has shared the unearned portion of the fee.

Similarly, the United States Code is replete with references in many different contexts to a "percentage" that can include 100%. See, *e.g.*, 5 U.S.C. 8348(g) (Supp. IV 2010) (civil service retirement and disability fund); 5 U.S.C. 8351(b)(2)(B) (thrift savings plan); 7 U.S.C. 1428(b) (Supp. IV 2010) (farm subsidies); 12 U.S.C. 1467a(m)(7)(B)(ii)(II) (savings associations); 12 U.S.C. 1706c(b)(2) (mortgage insurance); 12 U.S.C. 1709(w)(1)(A) (mortgage insurance); 12 U.S.C. 1715r(c)(2) (Supp. III 2009) (mortgage insurance); 20 U.S.C. 1022d(a)(1)(B)(i) (Supp. III 2009) (education grants); 26 U.S.C. 45F(d)(2)(A) (employer-provided child care credit); 26 U.S.C. 143(m)(4)(C)(i) (mortgage revenue bonds); 29 U.S.C. 1053(a)(2)(A)(iii) (pension plans); 42 U.S.C. 1395w-23(k)(4)(B)(i) (Supp. III 2009) (Medicare+Choice organizations).

Congress's use of the broad term "any" preceding "portion, split, or percentage" supports the understanding that "portion" and "percentage" can include the whole. See, *e.g.*, *HUD* v. *Rucker*, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (citation and some internal quotation marks omitted). Thus, RESPA's reference to "any portion * * * or percentage" of an unearned settlement service charge "includ[es] up to 100%" of such a charge, "whether the entire charge is divided or split among more than one

person or entity or is retained by a single person." 66 Fed. Reg. at 53,058.

ii. That the words "portion" and "percentage" appear in a list with "split" does not mean that all three of those terms must "require less than 100% of the whole of something," as the court of appeals concluded. See Pet. App. 9a. To support that conclusion, the court of appeals invoked the canon of construction *noscitur a sociis*, which "'dictates that words grouped in a list should be given related meaning.'" *Ibid.* (quoting *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990)). The court's reliance on that canon was misplaced.

This Court has repeatedly explained that the *noscitur a sociis* canon does not prescribe an "invariable rule." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010) (quoting *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923)). The terms "portion," "split," and "percentage" are not synonymous, nor is the fit between them "so tight or so self-evident" that any one of them should be "rob[bed] * * * of 'its independent and ordinary significance.'" *Ibid.* (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338-339 (1979)). Section 2607(b)'s prohibition against accepting any portion, split or percentage is "written in the disjunctive," and the prohibition therefore is "not limited to a split." 66 Fed. Reg. at 53,058. If a person accepts any portion or percentage of a settlement charge—including the entire unearned portion of that fee or 100% of a wholly unearned fee—other than for services actually performed, he has violated Section 2607(b).

d. Finally, the court of appeals' interpretation of Section 2607(b) would lead to absurd results. See *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011)

(courts should avoid absurd results when interpreting statutes). Under the court of appeals' approach, a lender would violate Section 2607(b) if it charged a borrower $250 for a title search provided by a third party for $200 and then split the $50 unearned fee with the third party. If the lender kept the entire $50 unearned fee, however, the court of appeals would find no violation. And if the lender collected $250 from the borrower for a title search but no title search was performed, the court would likewise conclude that no violation had occurred. Under that approach, the kinds and amounts of unearned fees that a lender (or other settlement service provider) could charge a consumer would be limited only by the lender's creativity.

2. Construing Section 2607(b) to prohibit undivided unearned fees furthers RESPA's purpose of protecting consumers from unnecessarily high settlement charges caused by certain abusive practices

a. Congress enacted RESPA to ensure that "consumers * * * are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). Interpreting Section 2607(b) to prohibit settlement service providers from charging consumers unearned fees is consistent with Congress's overarching intent to "protect[] [consumers] from unnecessarily high settlement charges caused by certain abusive practices." *Ibid.*

b. In concluding that RESPA is exclusively an anti-kickback statute (Pet. App. 10a), the court of appeals relied in part on Congress's identification of "the elimination of kickbacks or referral fees" as one of RESPA's

"purpose[s]." 12 U.S.C. 2601(b)(2).[5] Section 2601(b)'s list of statutory "purpose[s]," however, cannot reasonably be viewed as exhaustive. If it were, then other substantive RESPA provisions—such as the prohibition of fees for preparing truth-in-lending statements, 12 U.S.C. 2610, or the prohibition on sellers requiring the use of their chosen title company, 12 U.S.C. 2608—would be unenforceable because Section 2601(b) does not specifically identify the elimination of such practices as "purpose[s]" of RESPA.[6]

This Court has repeatedly explained that the omission of particular conduct from a statute's "purpose" section is "irrelevant" when the statute's operative provisions unambiguously address that conduct. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of

---

[5] Section 2601(b) provides:

> It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
>
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local recordkeeping of land title information.

[6] Both of those requirements were enacted in the initial 1974 version of RESPA, along with the statement of purposes. See Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, §§ 9, 12, 88 Stat. 1724, 1728, 1729.

our laws rather than the principal concerns of our legislators by which we are governed."). Section 2607(b) unambiguously encompasses conduct different from "kickbacks" and "referral fees." In particular, Section 2607(b) encompasses a broad range of unearned fees that the violator obtains directly from the consumer rather than from another settlement service provider. See pp. 13-20, *supra*.

Congress's own characterization of Section 2607 in its title, "Prohibition against kickbacks and unearned fees," RESPA § 8, 88 Stat. 1727, assumes that the two categories of payments are not identical and thus reinforces the conclusion that RESPA is not exclusively "an anti-kickback statute," Pet. App. 10a.[7] Section 2607(c) further supports that reading of the statute by providing a safe harbor for specified fees and "bona fide" compensation paid for goods or services "actually rendered," "actually performed," or "actually furnished." 12 U.S.C. 2607(c)(1) and (2). If unearned fees were beyond RESPA's reach, that safe harbor would be unnecessary.

c. The court of appeals was also wrong in stating that RESPA's legislative history cannot "be fairly read to cover undivided [unearned] fees." Pet. App. 11a n.9. The court relied on the Senate Report's statement that Section 2607 "'is intended to prohibit all kickback or

---

[7] By contrast, the title of Section 2607(b) in the United States Code, "Splitting charges," does not appear in the Statutes at Large. See RESPA § 8(b), 88 Stat. 1727. Because Title 12 of the United States Code has not yet been "enacted into positive law," 1 U.S.C. 204(a), the Statutes at Large provide the "legal evidence of laws," 1 U.S.C. 112. Thus, contrary to respondent's suggestion (Br. in Opp. 5-6), the title of Section 2607(b) in the United States Code is due no weight. See *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

referral fee arrangements.'" *Ibid.* (emphasis omitted) (quoting S. Rep. No. 866, 93d Cong., 2d Sess. 6 (1974) (Senate Report)). That Senate Report stated at the outset, however, that one of the purposes of the bill subsequently enacted as RESPA was the elimination of "kickbacks *and unearned fees*." Senate Report 1 (emphasis added). The report also identified, as one of the "problem areas" that RESPA was intended to address, *id.* at 3, "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers *without providing any real benefits to them*," *id.* at 2 (emphasis added). The report stated further that, "[b]y dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account requirements, * * * [RESPA] will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." *Id.* at 3 (emphasis added). The House Report reiterated those views. H.R. Rep. No. 1177, 93d Cong., 2d Sess. 3, 4 (1974).

B. Any Ambiguity In The Text Of Section 2607(b) Is Resolved By HUD's Longstanding Interpretation, Which Is Entitled To Judicial Deference

To the extent that Section 2607(b)'s text is unclear, HUD's longstanding interpretation is entitled to deference.[8] When a statute is ambiguous, a court must deter-

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[8] As the court of appeals observed (Pet. App. 6a), the Fourth, Seventh, and Eighth Circuits have held that Section 2607(b) is violated only when two culpable parties share an unearned fee. See *Boulware* v. *Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002); *Krzalic* v. *Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002), cert. denied, 539 U.S. 958 (2003); *Haug* v. *Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003)). In contrast, the Second, Third, and Eleventh Circuits have held that Section 2607(b) is violated when a party marks up the fee for a

mine whether the agency's interpretation is based on "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). If Congress has expressly delegated authority to the agency "to elucidate a specific provision of the statute by regulation," any regulations promulgated pursuant to that grant of power are to be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (agency's interpretation of its statute is entitled to *Chevron* deference if Congress has delegated authority to the agency "to make rules carrying the force of law," and interpretation was "promulgated in the exercise of that authority").

1. Congress authorized HUD "to prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a). Exercising that authority, HUD determined through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed * * * is an unearned fee and violates [Section 2607(b)]." 24 C.F.R. 3500.14(c). Undivided, unearned fees fall squarely within that agency interpretation, which should be given controlling weight. In stating that it would not defer to HUD's policy statement because it was not adopted through notice-and-comment rulemaking (Pet. App. 13a), the court of

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settlement service provided by a third party and retains the entire unearned portion of the fee. See *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 61-62 (2d Cir. 2004); *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005); *Sosa*, 348 F.3d at 982-983. The Second Circuit also has held that Section 2607(b) prohibits undivided unearned fees charged by a settlement service provider. *Cohen* v. *JP Morgan Chase & Co.*, 498 F.3d 111, 113, 124-125 (2007).

appeals overlooked HUD's regulation interpreting the same provision.

2. In addition to that regulation, HUD issued a policy statement that specifically sets forth the agency's consistent, longstanding view that Section 2607(b) prohibits all unearned fees, whether or not those fees are shared with another person. 66 Fed. Reg. at 53,058. Like the regulation, that policy statement is an official agency interpretation that is entitled to *Chevron* deference.

This Court has made clear that *Chevron* deference may be appropriate even when an agency interpretation is reached "through means less formal than 'notice and comment' rulemaking." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002); see *Mead*, 533 U.S. at 230-231; *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 58-61 (2d Cir. 2004) (deferring to HUD's policy statement).[9] RESPA's grant of interpretive authority to HUD is unusually broad. Section 2617(a) authorized HUD not only to "prescribe * * * rules and regulations," but also to "make * * * interpretations" that are "necessary to achieve the purposes of [RESPA]." See 57 Fed. Reg. at 49,604 (Section 2617(a) gave HUD authority to render "official interpretations" by means other than regulations). To implement that authority,

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[9] The court of appeals relied on this Court's statement in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that "interpretations contained in policy statements * * * lack the force of law" and "do not warrant *Chevron*-style deference." *Id.* at 587; see Pet. App. 12a-13a. In *Barnhart*, however, the Court declined to read *Christensen* as establishing "an absolute rule" that an interpretation reached through "means less formal than 'notice and comment' rulemaking" is "automatically deprive[d] * * * of the judicial deference otherwise its due." 535 U.S. at 221-222.

HUD established by regulation a procedure through which it rendered "official interpretations" in the form of "statement[s] of policy" published in the *Federal Register*. See 24 C.F.R. 3500.4(a)(1)(ii). And, insofar as the policy statement construes HUD's own regulations, see 66 Fed. Reg. at 53,057-53,059, it is "controlling." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

3. Another provision of RESPA confirms Congress's intent that HUD's interpretation of the statute—whether in a regulation or a policy statement—would be afforded *Chevron* deference. Section 2617(b) states that a party is not liable for any RESPA violation committed "in good faith in conformity with any [HUD] rule, regulation, or interpretation," even if such rule, regulation, or interpretation is subsequently amended, rescinded, or declared invalid by a court or other authority. 12 U.S.C. 2617(b). Section 2617(b) parallels a provision added to the Truth in Lending Act (TILA) in the same year that RESPA was enacted. See Pub. L. No. 93-495, § 406, 88 Stat. 1518 (15 U.S.C. 1640(f)).

In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), the Court explained that the purpose of the analogous TILA provision was to promote resolution of "interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. Enactment of that provision, the Court concluded, "signal[ed] an unmistakable congressional decision to treat administrative rulemaking and interpretation under [the statute] as authoritative." *Id.* at 567-568; see *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010) (citing similar language in the Fair Debt Collection Practices Act, 15 U.S.C. 1692k(e), as evidence of Congress's expectation that Federal Trade Commission would resolve ambigu-

ities in that statute). Section 2617(b) reflects Congress's similar intent that HUD's interpretations of RESPA would be entitled to substantial weight. And by broadly drafting Section 2617(b) to encompass "any [HUD] rule, regulation, *or interpretation*," 12 U.S.C. 2617(b) (emphasis added), Congress made clear that HUD need not promulgate a regulation in order for its interpretation of RESPA to be treated as authoritative.

C. The Courts Below Erred In Holding That Respondent Was Entitled To Summary Judgment

1. Under a correct interpretation of Section 2607(b), respondent was not entitled to summary judgment. The Freemans and the Bennetts allege that respondent charged them "loan discount fee[s]" but provided no corresponding reductions in the interest rates on their mortgage loans. Pet. App. 20a-21a, 22a; J.A. 8-9 (Freeman Compl. paras. 5-6); J.A. 28 (Bennett Compl. paras. 6-7). The Smiths similarly allege that respondent charged them a "loan origination" fee that was duplicative of the "processing fee" that they were charged and for which no or only nominal service was provided. Pet. App. 2a-3a; J.A. 78-79 (Smith Compl., paras. 5, 7). If petitioners can prove those allegations, respondent violated Section 2607(b) by accepting a "portion * * * or percentage"—the entirety or 100%—of the loan discount and loan origination fees that petitioners were charged, without "actually perform[ing]" any services in return.

2. In its brief in opposition, respondent contended that the grant of summary judgment in its favor is independently supported by two alternative rationales. Specifically, respondent contends that loan discount fees fall outside Section 2607(b) because they are not fees for settlement services, and that the fees in this case were

earned. The Court should not address those issues, which will remain open to the courts below on remand if the Court holds that Section 2607(b) encompasses undivided unearned fees. In any event, respondent's alternative arguments lack merit.

a. Respondent has asserted (Br. in Opp. 18) that it did not violate Section 2607(b) by charging petitioners loan discount fees without providing anything in return because loan discount fees are not fees for "[s]ettlement services," but rather are "part of the pricing of a loan." *Ibid.* Neither the court of appeals nor the district court addressed that alternative ground for dismissal of the complaints, see Pet. App. 4a n.1; *id.* at 66a-67a, 69a, and the issue is not logically antecedent to the question presented here. If the Court holds that an undivided unearned fee can violate Section 2607(b), the court of appeals may consider on remand respondent's alternative argument that a loan discount fee is not a charge for a settlement service. See, *e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949, 1965 (2010) (reversing court of appeals' judgment "with respect to Congress' power to enact [the statute at issue]," and stating that respondents were free to pursue on remand any other claims they had preserved).[10]

In any event, respondent's argument is contrary to RESPA's definition of "[s]ettlement services," 12 U.S.C. 2602(3), and HUD's consistent interpretation of the statute. Beginning in 1975, HUD identified (i) fees charged

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[10] The Eleventh Circuit is thus far the only court of appeals to address whether a loan discount fee is a charge for a "settlement service" under RESPA. With little discussion of HUD's interpretation, that court held that such fees are not covered by RESPA. *Wooten* v. *Quicken Loans, Inc.*, 626 F.3d 1187, 1189, 1195 (2010). On October 3, 2011, the Court denied certiorari in *Wooten* (No. 11-43).

for processing or originating a loan and (ii) loan discount fees (*i.e.*, points) as "settlement charges" that were required to be recorded separately on lines 801 and 802 of the HUD-1 form. 40 Fed. Reg. at 22,456 (24 C.F.R. Pt. 82, App. A (1976)); see 41 Fed. Reg. at 20,284 (loan origination fee "covers the lender's administrative costs in processing the loan," and loan discount fee is "a one-time charge made by the lender to compensate for making a loan at a lower interest rate than would be otherwise charged").

Notwithstanding HUD's expressed view as to the range of "settlement services" covered by RESPA, the Sixth Circuit reached a contrary conclusion in *United States* v. *Graham Mortgage Corp.*, 740 F.2d 414 (1984). *Graham Mortgage* involved a criminal prosecution in which the defendants were charged with giving and receiving unlawful kickbacks through "the making of mortgage loans at a reduced charge of points in exchange for referrals of mortgage loan applicants." *Id.* at 415-416. The defendants argued that RESPA did not prohibit their conduct because "the making of a mortgage loan is not 'a real estate settlement service.'" *Id.* at 416. The Sixth Circuit concluded that RESPA's text was ambiguous on that coverage question, *id.* at 417-419; that the legislative history did not resolve the ambiguity, *id.* at 419-421; and that HUD's interpretation of the term "[s]ettlement services" as encompassing the making of mortgage loans was not entitled to deference, *id.* at 421-423. The court then applied the rule of lenity and vacated the defendants' convictions. *Id.* at 423.

Congress responded to *Graham Mortgage* by amending RESPA's definition of "[s]ettlement services" specifically to include "the origination of a federally related mortgage loan (including, but not limited to, the taking

of loan applications, loan processing, and the underwriting and funding of loans)." Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873 (12 U.S.C. 2602(3)). As the House Report explained, "mortgage lending must be included as a settlement service to preserve the effectiveness of RESPA as a consumer protection statute." H.R. Rep. No. 760, 102d Cong., 2d Sess. 158 (1992).

HUD's current regulations mirror the statutory definition and also include as settlement services the "[p]rovision of any services related to the origination, processing or funding of a federally related mortgage loan." 24 C.F.R. 3500.2(b). Thus, on the HUD-1 form under "Section L. Settlement Charges," line 801 should reflect any fee charged by the lender for originating the loan, "including administrative and processing services," "except any charge for the specific interest rate chosen (points)." 24 C.F.R. Pt. 3500, App. A. Line 802 should show the "charge (points) for the specific interest rate chosen." *Ibid.* The sum of lines 801 and 802 are reflected on line 803 as the borrower's "adjusted origination charges," which "states the net amount of the loan origination charges." *Ibid.*

Discount points are best understood as one of the charges for the funding of the loan. In exchange for the funding, the borrower pays two charges that are structured differently—interest (over time) and origination and points (at closing). Because the funding of a federally related mortgage loan is a "settlement service" under RESPA, a discount fee is a "charge made or received for the rendering of a real estate settlement service" and is therefore covered by Section 2607(b).

b. Respondent has further asserted (Br. in Opp. 19-21) that, because the loan discount fees charged to peti-

tioners were "conditions of and prerequisites" to funding petitioners' loans, the fees were "earned." *Id.* at 20 (emphasis omitted). According to respondent (*id.* at 21), petitioners are, at most, complaining that they were "overcharge[d]" for the reasonable value of their loans. As respondent notes (*ibid.*), all courts of appeals to have ruled on the issue have held that Section 2607(b) does not "impose price controls and therefore does not prohibit 'overcharges'" for services actually provided. *Kruse*, 383 F.3d at 57; see also *Martinez* v. *Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 554 (9th Cir. 2010); *Friedman* v. *Market St. Mortgage Corp.*, 520 F.3d 1289, 1291-1297 (11th Cir. 2008); *Santiago*, 417 F.3d at 387-388.

Contrary to respondent's suggestion (Br. in Opp. 19-21), neither of the courts below made a finding that the challenged loan discount fees were earned. The court of appeals and the district court both concluded that respondent was entitled to summary judgment as a matter of law because respondent did not split the allegedly *unearned* fees with any other party. See Pet. App. 2a, 5a-6a (characterizing this case as involving undivided unearned fees, not overcharges); *id.* at 66a-67a, 69a (same). If this Court reverses the judgment below, the court of appeals can consider on remand respondent's alternative argument that the loan discount fees were earned.

In any event, when a lender provides a loan with the same interest rate it would have charged in the absence of discount points, those points cannot be viewed as an earned charge for the funding of the loan. Respondent is wrong in suggesting that the discount and origination fees at issue here bore a sufficient connection to settlement services that respondent "actually performed," 12

U.S.C. 2607(b), simply because those fees were a "component of the pricing of Petitioners' loans." Br. in Opp. 20. HUD has long construed Section 2607(b) as prohibiting "duplicative" fees for essentially the same service. 24 C.F.R. 3500.14(c). A "duplicative" fee is therefore "unearned," even though it bears some relation to a service that is actually rendered, because the buyer receives no added value beyond the service for which she has already paid. Thus, although a loan discount fee might be viewed as an "overcharge" if it is simply exorbitant in relation to the interest-rate reduction it procures, a discount fee that procures *no* interest-rate reduction would be a fee "other than for services actually performed," 12 U.S.C. 2607(b), even if overcharges are assumed to fall outside Section 2607(b)'s coverage.[11]

---

[11] As Judge Higginbotham noted in dissent, prohibiting undivided unearned fees "would not lead * * * to a rate-setting regime." Pet. App. 17a-18a. First, as Judge Higginbotham explained, "the reasonable fee for nothing is nothing," and thus "[w]hen [a] fee is entirely unearned, the court is not forced to determine the reasonableness of a fee." *Ibid.* Second, if the potential for Section 2607(b) to operate as a rate-setting regime is perceived as a problem, requiring that the unearned fee be divided between two or more parties to violate Section 2607(b) would not be a solution. Under the court of appeals' approach, a settlement service provider would violate Section 2607(b) by splitting an unearned fee with another culpable actor after it initially lawfully "accept[ed]" the unearned fee from the consumer. That interpretation likewise requires a determination of whether the fee was "unearned."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-1042

In The
Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL., PETITIONERS

v.

QUICKEN LOANS, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 8(b) of the Real Estate Settlement Procedures Act (RESPA) prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

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BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, The Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, and Mortgage Bankers Association respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

The American Bankers Association (ABA) is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including national and state

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

chartered banks; community, regional, and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the ABA are located in each of the 50 states and the District of Columbia, and collectively they account for approximately 90% of the domestic assets of the banking industry in the United States.

The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years.

The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Housing Policy Council of the Financial Services Roundtable is made up of thirty-two companies that are among the nation's leaders in mortgage finance. Member companies originate seventy-five percent of the mortgages for American home buyers and provide mortgage insurance and servicing to the majority of American home owners.

The Independent Community Bankers of America is a trade association that represents nearly 5,000 community banks of all sizes and charter types nationwide. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes. ICBA member community banks are actively engaged in the business of residential mortgage lending in the communities that they serve. ICBA members hold more than $1 trillion in

assets, $900 billion in deposits, and $700 billion in loans to consumers, small business and the agricultural community.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the nation. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's website: www.mortgagebankers.org.

Amici's members are subject to the Real Estate Settlement Procedures Act, and have a strong interest in the construction and application of the laws governing the mortgage lending industry on behalf of their members and the consumers they serve.

INTRODUCTION

Congress enacted the Real Estate Settlement Procedures Act (RESPA) to assure more effective advance disclosure to home buyers and sellers of settlement costs and the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services; to reduce the amounts home buyers are required to place in escrow accounts established to ensure the payment of real estate taxes and insurance; and to reform and modernize local recordkeeping of land title information.

To that end, borrowers must be provided an initial, itemized good faith estimate of costs, and then, at closing, a final HUD-1 settlement statement of the actual costs. The good faith estimate informs the borrower of the estimated costs of the home loan at the time of mortgage application. The HUD-1 allows the borrower to compare those estimated costs against the actual costs. And, in Section 8 of RESPA, 12 U.S.C. § 2607, Congress prohibited "certain abusive practices"—namely, kickbacks, referral fees, and fee splits—that inflate the costs of settlement services and are generally hidden or obscured from the borrower.

Contrary to petitioners' contention, Congress did not enact RESPA, and particularly Section 2607(b), as a broad antifraud and federal rate-setting scheme for residential lending. Had it done so, Congress would have deprived consumers of significant loan pricing options that amici's members provide.

Indeed, the mortgage industry has responded to consumer demands by providing an array of flexible and sound options for paying the costs of the mortgage loan, including closing costs, through up-front charges, interest rates and points, or a combination. Points and other rate- or loan-pricing-related charges are available to consumers to lower monthly payments and make homeownership options more affordable and flexible. Adoption of petitioners' rate-setting construction of Section 2607(b) would dramatically and negatively affect the availability of these consumer-driven pricing terms.

Congress struck a careful balance in enacting RESPA: it sought to ensure that borrowers possessed sufficient information to make informed borrowing decisions, without restricting the choices available to consumers or undermining the ability of lenders, and market conditions, to appropriately price credit.

Consistent with the fact that Congress did not intend for Section 2607(b) to dictate the cost of credit, Section 2607(b)—by its express terms—does not permit after-the-fact challenges to fees and costs charged and retained by lenders solely on the ground that they are "unearned" or too high. Instead, it prohibits only *divided* charges for which no service is provided. Moreover, although the Court need not reach the issue to resolve the question presented, the United States is incorrect in asserting in its amicus brief that Section 2607(b) covers points—points are an integral

part of the pricing of the loan, not a charge for "settlement service."

STATEMENT

In this case, each petitioner asserts that Quicken Loans violated RESPA by charging loan discount fees, which are often synonymous with points, without providing a discount. To correctly decide the narrow "undivided charges" question on which the Court granted review, amici believe certain background principles are fundamental: *first*, the ability to offer innovative mortgage pricing terms is essential to meet consumer demand, and *second*, loan discount fees or "points"—which generally allow borrowers to obtain a certain interest rate—are a key component of the mortgage pricing flexibility that lenders can offer. As amici explain *infra*, Section 2607(b) was not intended to regulate, or set the rates for, the various types of mortgage pricing options that consumers demand and lenders provide.

Loan discount fees—or points—are an important mechanism in which lenders have enhanced consumer choice. As HUD has recognized, points constitute an amount "paid to the lender or broker for the loan [that is] often linked to the interest rate." U.S. Dep't of Hous. & Urban Dev., *Looking for the Best Mortgage* 3, *available at* http://hud.gov/buying/booklet.pdf [hereinafter HUD, *Looking for the Best Mortgage*] (defining points); *see also id.* at 6 (recognizing that points "may be called loan discount points").

Generally speaking, points are up-front money paid to the lender, which otherwise would have been charged as part of the interest rate. Each point generally costs 1% of the principal being financed. *See* Holden Lewis, *Paying Mortgage Discount Points: A Primer*, *available at* http://www.bankrate.com/brm/news/mortgages/20060126a1.asp. Points are treated as interest for some revenue purposes by the IRS, and thus are tax deductible. *See* IRS Pub. 936, 2010 WL 5056310 (I.R.S. Nov. 30, 2010).[2]

Sometimes, a borrower pays points to obtain a loan at a specific interest rate below the rate the lender otherwise would offer that particular borrower. U.S. Dep't of Hous. & Urban Dev., *HUD-398-H[4], Buying Your Home: Settlement Costs and Information* 14-15 (1997), *available at* portal.hud.gov/hudportal/documents/huddoc?id=DOC_12893.pdf (hereinafter HUD, *Buying Your Home*). Thus, if a borrower wants a lower rate than that quoted by the lender, the buyer may have the opportunity to buy down the interest rate of the loan by paying "discount points" to the lender. The amount of the discount can vary, but "usually the more points you pay, the lower the rate." HUD, *Looking for the Best Mortgage*, *supra*, at 3; *see*

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[2] As the Department of Housing and Urban Development Booklet, *Looking for the Best Mortgage*, recognizes, "in some cases, the money needed to pay points can be borrowed." HUD, *Looking for the Best Mortgage*, *supra*, at 5. When that occurs, the money will be repaid over the life of the loan.

also id. (stating that points are "often linked to the interest rate").

For example, a lender might offer a borrower a 30-year fixed rate mortgage for $200,000 at 6 percent interest with no points. The monthly principal and interest payment would be $1199.10. If the borrower paid 2 points up front to the lender (at a cost of $4000), however, the lender might agree to bring the interest rate down to 5.5 percent, making the monthly payment $1135.58. The savings difference would be $63.52 per month for the life of the loan.

Other times, the payment of a certain number of points may be tied to a lender's *initial* interest rate offer, rather than to a reduced or below-market interest rate. For example, a lender may conclude that a potential borrower's credit-worthiness requires a certain number of points to be paid in order to obtain a given interest rate. HUD, *Buying Your Home*, *supra*, at 14-15. Or a lender's advertised interest rate may require points to be paid—e.g., 5.5 percent with 1 point—and that particular lender might not offer pricing on that loan without points. Points also may account in particular transactions for such things as an extended period for which the borrower has "locked" in the interest rate before the loan closing—which can be particularly useful to the borrower during periods of rising interest rates, or where there is an elongated period before closing. In these situations, points still are an integral component of the pricing of the loan.

These pricing options provide borrowers with greater flexibility, and assist lenders in meeting consumer demand for affordable housing. Indeed, different borrowers have different needs. Borrowers interested in keeping a mortgage for an extended period of time may express a preference for obtaining a lower interest rate, even when such rates may be conditioned on the payment of more points. Conversely, borrowers who routinely look to refinance in periods of declining interest rates may prefer to pay fewer or no points, for an incrementally higher interest rate.

The use of points also may allow borrowers to obtain specific mortgage products not otherwise available to them. For example, different mortgage products (fixed, adjustable, hybrid fixed and adjustable, interest only, balloon, short maturity v. long maturity) typically require separate underwriting and qualifying criteria. Some borrowers interested in tailoring a particular type of loan to their unique financial needs may only qualify for that loan if they agree to pay points to offset the increased credit risks.

In all of these circumstances, the "points," discount or otherwise, are part of the pricing of the loan.

SUMMARY OF ARGUMENT

In enacting RESPA, Congress did not create a rate-setting statute. But acceptance of petitioners' contentions effectively would convert Section 2607(b) into just such a rate-setting provision.

A. Congress expressly considered and rejected a rate regulation scheme. In doing so, Congress recognized that there were "two basic approaches" it could take to solve the problems associated with settlement practices in enacting RESPA—(1) regulate the costs directly or (2) regulate the underlying business relationships by requiring disclosures and proscribing specific practices. As RESPA's text and history confirm, Congress adopted the latter approach. It determined that enacting a system of price regulations—where the government rather than the market and consumer demand determined the available mortgage products and prices—would be "both unwise and unworkable." The Court should not now reach out to do what Congress expressly rejected. Doing so would be particularly unwise because it would require ad hoc judicial administration of the statute, would increase substantially the number of lawsuits under RESPA, and would harm consumers by increasing the cost and decreasing the availability of credit and mortgage options.

B. On the narrow question before the Court, there can be no liability under Section 2607(b) when the charge being challenged was undivided. Section 2607(b)'s plain language requires *two* culpable actors:

one party must "give" *and* another party must "accept" some part of the charge. Moreover, Congress used the words "portion," "split," and "percentage"—each of which indicates something less than a whole.

C. Even if Section 2607(b) applies to undivided charges, loan discount fees—or points—cannot be the basis for liability because they are part of the loan's pricing. Although the Court need not reach this issue to resolve the question presented, amici nevertheless address it to respond to the contrary assertion made by the United States. *See* U.S. Br. 28-30.

Points—as a pricing term of the mortgage—are not subject to Section 2607(b). By its express terms, Section 2607(b) applies only to "a real estate *settlement service* in connection with a transaction involving a federally related mortgage loan other than for services actually performed," which does not include points. 12 U.S.C. § 2607(b) (emphasis added). As defined by the statute, "settlement services" are best understood as tasks done or arranged by the lender or a service provider in order to originate or to close the loan or any related real estate transaction. *Id.* § 2602(3). Thus, Congress listed as examples of settlement services activities such as "loan processing," "title examinations," "the preparation of documents," and "property surveys." *Ibid.* Because none of these enumerated tasks go to anything beyond the administrative process of closing a mortgage, Section 2607(b) cannot be understood to apply to the pricing of the loan itself, which does not involve settlement services.

ARGUMENT

IN ENACTING RESPA, CONGRESS DID NOT CREATE A RATE-SETTING STATUTE FOR THE PRICING OF MORTGAGES

A. Congress Considered, But Rejected As Bad Policy, Legislation That Would Have Regulated Loan Pricing And Restricted The Mortgage Options Available To Consumers

In enacting RESPA, Congress rejected competing legislation that would have created a rate-setting scheme for mortgages. Congress recognized that a federal regulatory system of real estate price controls would be unworkable and undesirable. Congress thus did not intend for RESPA to impose a maximum amount that lenders could charge.

1. When RESPA was introduced in Congress, the Senate had been considering competing legislation that contained price control provisions. This bill, S. 2288, would have expanded the narrow pricing authority that Congress previously had granted HUD and the Veterans Administration in the Emergency Home Finance Act of 1970.[3] The proposed legislation would have conferred on the agencies the broad ability to regulate settlement charges in the industry generally. *See* S. Rep. No. 93-866 at 1-3, *reprinted in*

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[3] Emergency Home Finance Act of 1970, P.L. 91-351, § 701, 84 Stat. 461, 461-462 (directing HUD and the VA to prescribe settlement costs standards for certain FHA-VA mortgage transactions).

1974 U.S.C.C.A.N. at 6546-6548. Specifically, unlike RESPA, S. 2288 would have empowered HUD to "establish the maximum amounts of the charges to be imposed upon the borrower and seller for services incident to or a part of a real estate settlement . . . which shall be designed to reflect the reasonable charges for necessary services . . . and to assure that settlement costs do not exceed such reasonable charges." S. 2288, 93rd Cong. § 4(a)(1) (1973).

There can be little doubt that Congress understood the stark choice before it in these two competing bills. The Senate and House Reports recognized that "there are two basic approaches that can be taken in solving the problems of settlement costs." S. Rep. No. 93-866 at 3, *reprinted in* 1974 U.S.C.C.A.N. at 6548. Congress knew it could either "regulate the costs directly"—as the rejected legislation aimed to do—or "regulate the underlying business relationships"—as RESPA does. *Ibid.* Faced with that choice, Congress rejected the settlement price control approach of S. 2288 in favor of the more measured, disclosure-driven approach of RESPA.

Indeed, Congress actually *repealed* the limited price control authority that it previously had given HUD and the Veterans Administration under the Emergency Home Finance Act of 1970. *See* Pub. L. No. 93-533, § 14, 88 Stat. 1730 (previously codified at 12 U.S.C. § 2612(b)(2) (1996) (repealed as obsolete by Pub. L. No. 104-208, § 2103(h), 110 Stat. 3009 (1996)). Congress instead replaced that prior, limited authority with the directive that HUD should study over

five years "whether Federal regulation of the charges for real estate settlement services . . . is necessary and desirable," and if so provide "a description and analysis of the regulation scheme [HUD] believes that Congress should adopt." *Ibid.*

2. Moreover, the legislative history concerning RESPA itself further shows that it was not intended to regulate the costs of settlement services.

The Report of the Senate Banking, Housing and Urban Affairs Committee described that Section 2607(b) intended to make unlawful

> kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed.

S. Rep. No. 93-866 at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6551; *see also* 120 Cong. Rec. 29,442-29,443 (Aug. 20, 1974) (statement of Rep. Blackburn) (explaining that RESPA "intended to deal only with fee-splitting arrangements among participants in the settlement process" and that it would not impose liability simply because "the homebuyer believes that the charge made to him is in excess of the reasonable value of the services rendered").

The Senate Report further recognized that federal rate regulation of settlement charges "would be both unwise and unworkable" and enumerated five trenchant problems with such a regulatory scheme. S. Rep. No. 93-866 at 7, *reprinted in* 1974 U.S.C.C.A.N. at 6553.

First, the report acknowledged that federal rate control required "clear and convincing findings that settlement charges are unreasonably high on a widespread basis . . . and there is no other more practical way to deal with the problem." *Ibid.* *Second*, the report concluded that there were more "practical ways to deal with the problem." *Ibid.* *Third*, the abuses were not so pervasive and widespread to warrant "plac[ing] tens of thousands of individuals or businesses that supply settlement services under Federal rate-making." *Ibid.* *Fourth*, the report noted that such federal rate-making oversight would require a "large bureaucracy" to avoid "arbitrary and unfair decisions that may result if rates are set in the absence of the usual rate-setting safeguards." *Ibid.* *Fifth*, it recognized that such federal rate-setting power "would infringe on an area that has historically been of State or local concern and, in some instances, would duplicate existing State regulatory schemes." *Ibid.*

These reasons demonstrate that the decision to implement a federal rate-making regime of settlement costs—which petitioners, in effect, ask this Court to impose—should be a question of legislative judgment, not judicial decision making.

B. Section 2607(b) Applies Only To Divided Fees

The text of Section 2607(b) confirms that Congress did not intend to regulate the *amount* that a borrower can be charged for any particular service. Rather, that provision was aimed at prohibiting only certain fee shifting arrangements. This Court should not resurrect the very bill that Congress rejected.

1. The plain language of Section 2607(b) does not impose liability where a charge for a settlement service is not divided. Section 2607(b) provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). Petitioners' contention that Section 2607(b) imposes liability on a lender who retains an undivided charge reads several statutory requirements out of the statute.

First, liability under Section 2607(b) requires *two* culpable actors: one party must "give" *and* another party must "accept" some part of the charge. The use of "and" to conjoin "no person shall give" with "no person shall accept" requires that both conditions must be present. *Crooks v. Harrelson*, 282 U.S. 55, 59 (1930) (where provision contains two conditions separated by "and," it must be read in the conjunctive,

and "may not be read as though stated disjunctively").

Second, Congress used the words "portion," "split," and "percentage." These words, which are undefined by the statute, commonly are understood to mean something less than the whole. *See, e.g.*, *American Heritage Dictionary* 1412 (3rd ed. 1992) (defining "portion" as "[a] section or quantity within a larger thing"); *id.* at 1739 (defining a "split" as "[s]omething divided"); *id.* at 1343 (defining "percentage" as "[a] fraction or ratio with 100 understood as the denominator"). Read together, the phrase "any portion, split, or percentage" most naturally refers to a part of the disputed charge, rather than the whole charge. *See Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) ("it is a familiar principle of statutory construction that words grouped in a list should be given related meaning") (internal citations and quotations omitted).

2. The imposition of liability for unilateral conduct also would run counter to the broader statutory scheme.

If liability can be imposed under RESPA for receiving an undivided fee, petitioners themselves would be just as liable—for "giving" an undivided, unearned fee—as several courts have recognized. *See, e.g.*, *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002). Such a construction would be "irrational" and "perverse." *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002). Petitioners

acknowledge that it would make no sense for them to be liable for giving the fee to the lender. But they offer no justification in the statutory text as to how Section 2607(b) could be construed to impose liability on their lender while allowing them to evade liability.

3. Moreover, Congress's express purposes demonstrate that Congress intended RESPA to prohibit certain practices. The law proscribes conduct by two or more culpable parties, not unilateral conduct like that at issue here. In enacting RESPA, Congress sought to "effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601. Congress expressed no purpose about prohibiting undivided, unearned fees that might increase the costs of settlement services.

Indeed, imposition of liability under RESPA for any unearned, undivided fees for settlement services would be particularly incongruous in light of Congress's common-sense concern over *how* the value of such services could be determined under a federal rate-setting regime. Far from being subject to administrative rule making as to what constitutes a just and reasonable rate, the "value" for settlement services would be determined by judges and juries through litigation.

Such an ad hoc, standardless judicial administration of the reasonableness of charges cannot be what

Congress intended. This is particularly the case given that HUD-1 statements, which list the charges at closing, typically are completed by third party settlement agents (closing counsel in some States, escrow agents in others), not by the lender, and reflect substantial regional variation in the settlement services charged and how those charges are described. *See, e.g.*, Fed. Reserve Bd., *A Consumer's Guide To Mortgage Settlement Costs* 20-22 & nn.1-7, *available at* http://www.federalreserve.gov/pubs/settlement/mortgage_settlement.pdf.[4]

These variations, combined with other differences in prices charged and services rendered, often would require judges to conduct individualized, fact-sensitive inquiries.

Under this system, lenders would have a nearly impossible task of attempting to determine, ex ante, the likelihood that their charges would be found excessive and thus unearned under petitioners' standard. If the lender were to guess wrong, it might be subject not only to treble damages, costs, and attorneys fees, *see* 12 U.S.C. § 2607(d)(2), (5), but also the threat of criminal sanctions of up to 1 year in prison and a $10,000 fine per offense, *see id.* § 2607(d)(1).

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[4] Under these circumstances, it would be particularly improper for the Section 2607(b) analysis to turn on the description of the charge—e.g., "discount points," "points," etc.—ultimately used on the HUD-1 by these third parties.

These concerns are not inchoate. RESPA, through its remedies, already creates a strong incentive for borrowers to commence suit. If the Court authorizes plaintiffs to bring RESPA claims for *any* purportedly unearned fee, almost every borrower engaged in some dispute with a lender would have a strong incentive to sue under Section 2607(b) on the grounds that some lender-imposed fee was excessive and thus unearned. Congress could not have intended, sub silentio, to create broad incentives for such frivolous and expensive suits.

4. Most importantly, such a federal rate-setting regime would harm consumers by increasing the cost, reducing the number of choices consumers have, and decreasing the availability, of credit. If lenders were potentially subject to federal rate-setting lawsuits, lenders would need to account for the additional expenses and increased risks associated with each transaction. Lenders also might determine that certain cost-saving lending products are no longer feasible due to RESPA. That might result in borrowers facing higher interest rates. And some lenders, for fear of possible rate-setting litigation, might abandon certain markets or types of lending transactions—particularly those with increased risk of borrower default and corresponding litigation.

C. Even If Section 2607(b) Applies To Undivided Charges, It Does Not Apply To Loan Pricing

Although the Court need not reach the issue to resolve the question presented, Section 2607(b) does not cover the pricing of loans—including points—but is directed only to fees charged for "real estate settlement service[s]." 12 U.S.C. § 2607(b). The United States argues otherwise, by contending that points are a "settlement service." U.S. Br. 28-30. That argument cannot be reconciled with the text or purpose of the statute.

1. Section 2607(b) is expressly limited to a "charge" for "*the rendering of a real estate settlement service* in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b) (emphasis added). RESPA defines the term "settlement service" as "any service provided in connection with a real estate settlement." 12 U.S.C. § 2602(3). This includes, inter alia, "title searches," "title examinations," "the preparation of documents," "property surveys," and "the rendering of credit reports or appraisals." *Ibid.*; *see also* 24 C.F.R. § 3500.2.

None of these enumerated examples relates to the pricing of the underlying loan, such as the interest rate charged, the points paid, the amount of principal borrowed, or the repayment period. Rather, each service is a service done (or arranged) by a lender or third party that benefits the borrower or

seller by helping to ensure that the loan is made and closed. *See, e.g.*, *Black's Law Dictionary* 1491 (9th ed. 2009) ("service" is "the act of doing something useful for a person or company, usu[ally] for a fee"). Thus, even though the list is not exhaustive, it nevertheless limits the scope of "settlement service[s]" to similar arrangements. *Cf. Samantar v. Yousuf*, 130 S. Ct. 2278, 2287-2288 (2010) ("Even if the list in § 1603(a) is merely illustrative, it still suggests that 'foreign state' does not encompass officials, because the types of defendants listed are all entities"); *Begay v. United States*, 553 U.S. 137, 142 (2008) (recognizing that "[t]o give effect . . . to every clause and word of this statute," the Court must read the examples as limiting the scope of the provision to offenses "that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves") (internal citations and quotations omitted).

2. The findings of the statute confirm that Congress sought to regulate business practices relating to settlement costs under Section 2607(b), not the specific pricing terms of a mortgage, such as points or the interest rate that the borrower must pay the lender as the mortgage is amortized. Congress recognized that, because borrowers often did not know, or understand, the settlement services for which they were paying at closing, "significant reforms in the real estate settlement process" were necessary. 12 U.S.C. § 2601. Specifically, Congress sought to

> insure that consumers throughout the Nation are provided with greater and more

> timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.

Ibid. Thus, Congress addressed one aspect of the real estate process—settlement costs—primarily through certain methods, namely increased disclosures and elimination of referral fees and kickbacks.

Far from broadly regulating the price of credit, Section 2603(a), for example, requires that lenders provide borrowers with a standard disclosure form, the HUD-1. That form must "conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller *in connection with the settlement* . . . ." 12 U.S.C. § 2603(a) (emphasis added). Section 2607(a) prohibits compensation for referrals of "business incident to or a part of a *real estate settlement service.*" 12 U.S.C. § 2607(a) (emphasis added).

3. To be sure, as the United States points out (U.S. Br. 29-30), Congress expanded the definition of "settlement service[s]" in 1992 to encompass certain loan *origination* fees. *See* Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3873. Congress broadened that definition—and thus the scope of Section 2607(b)—in response to the Sixth Circuit's ruling in *United States v. Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984). In *Graham*, the Sixth Circuit had held that a loan origination fee was not a settlement service.

But contrary to the government's assertion (U.S. Br. 28-29), that amendment did not broaden the definition of settlement services beyond the tasks involved in making the loan to—for the first time—cover pricing terms, like interest and points. Congress simply included as a "service" "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans)." 12 U.S.C. § 2602(3); 24 C.F.R. § 3500.2. A charge for those services—whether called a loan origination fee, underwriting fee, processing fee, document preparation fee or the like—is just another "fee charged by a lender to cover the *administrative costs* of making a loan." *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1194 (11th Cir. 2010) (emphasis in original) (quoting *Black's Law Dictionary* 690 (9th ed. 2009)), cert. denied, 181 L. Ed. 2d 140 (2011). That amended text does not convert the loan's maturity, interest rate, points, or other pricing terms into services cognizable under Section 2607(b).

In short, a borrower should not be permitted to maintain a claim under Section 2607(b) on the ground that they paid points for which they did not receive a reduction, or a significant enough reduction, in interest rate. Because points, like the interest rate, are not tied to any particular administrative service, but rather are part of the negotiated price of the loan itself, they are substantive terms of the "loan agreement, not a service provided to borrowers."

Wooten, 626 F.3d at 1195. They are not settlement services covered by Section 2607(b). *Ibid.*

CONCLUSION

For the reasons set forth above and in the brief for respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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JANUARY 10, 2012

AMICUS CURIAE BRIEF

No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL.,
Petitioners,

v.

QUICKEN LOANS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN ESCROW ASSOCIATION, AMERICAN LAND TITLE ASSOCIATION, LEADING REAL ESTATE COMPANIES OF THE WORLD, THE REALTY ALLIANCE AND REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae and their members have a strong interest in the proper and consistent construction and application of existing federal statutes governing the mortgage lending industry.

Each of the members of amici curiae organizations (collectively "Amici" who are described in greater detail below) are settlement service providers whose pricing to consumers can be or has been improperly challenged because of the unauthorized and incorrect way that petitioners view, and that the Department of Housing and Urban Development ("HUD") has interpreted, section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b).[2] In contrast to those

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the amici curiae's intention to file this brief. The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

[2] Amici acknowledge that on July 21, 2011, HUD's authority to enforce and interpret RESPA was transferred to the Consumer Financial Protection Bureau ("CFPB"). Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 1061(b)(7), 124 Stat. 2038, 2039-40, 12 U.S.C. § 5581(b)(7). For convenience, Amici refer to HUD as the primary RESPA regulator, as have the parties. Amici further note that while petitioners and respondents have generally referred to 12 U.S.C. § 2607(b) or section 2607(b) in their briefs, the common practice in the industry is to refer to this as section 8(b), and Amici therefore utilize that terminology in textual references.

views, Amici believe that RESPA established a narrow and focused statutory program designed to improve the disclosure of settlement service pricing. Once consumers are properly advised about the service charges they will pay, those settlement charges were intended to be and should be free from further scrutiny under RESPA with respect to the amount charged and that amount's relationship to the value of the services provided, absent a referral, kickback, or some fee split. Congress never intended for RESPA to solve all perceived pricing problems because Congress realized that price regulation and caps bore their own set of problems as illustrated by many of the courts who have attempted to apply petitioners' view and HUD's position on section 8(b). *See infra* at Part III.

The American Escrow Association is a national association of real estate settlement agents. It acts on behalf of professionals conducting all types of settlement practices throughout the United States. Its goals are to further the knowledge and professionalism of settlement agents and to educate and advise decision makers at the national level on issues of consequence to the settlement industry as a whole.

The American Land Title Association ("ALTA") is the national trade association and voice of the abstract and title insurance industry. ALTA members include approximately 4,000 title agents, abstracters, and title insurance companies who search, review and/or insure land titles to protect homebuyers and mortgage lenders who invest in real estate.

Leading Real Estate Companies of the World® ("Leading RE") is a global real estate network comprised of 550 of the best known local and regional real estate firms. Leading RE links these trusted companies with well known brands under one umbrella to help consumers make the needed connections from market to market.

The Realty Alliance is a network of North America's elite real estate firms whose members serve most every major market in the country and who utilizing the resources of the Realty Alliance access the best and latest ideas and solutions to provide expert analysis and guidance to consumers.

RESPRO®—the Real Estate Service Providers Council, Inc.—is a national non-profit trade association comprised of more than 150 members from all segments of the residential home buying and financing industry including real estate broker-owners, mortgage lenders, title agents/underwriters, homebuilders, and financial institutions. They all offer a diversified menu of services (commonly referred to as "one-stop shopping") for homebuyers and homeowners through wholly owned subsidiaries or through joint ventures with other providers, both of which are designated under RESPA as "affiliated business arrangements." RESPRO has authored several amicus briefs on RESPA issues, and regularly testifies and comments on proposed legislation or regulations in the consumer finance area.

SUMMARY OF ARGUMENT

1. Amici agree with respondent's analysis that the text of section 8(b) makes plain that there must be two culpable actors (a giver and an acceptor) for

there to be a violation of this section. Amici emphasize two points relating to the text of RESPA.

First, petitioners' construction, which would make consumers liable for paying unearned fees, is strong evidence that Congress never intended section 8(b) to be interpreted in this fashion. While petitioners have constructed an argument whereby consumers might not have to pay damages for such a violation, that argument, even if correct, is predicated in part on an intent standard that does not exist under section 8(b) and that, in any case, does not relieve consumers of potential criminal liability or injunctive actions. Moreover, it makes little sense to assume, as do petitioners and their amici, that Congress would have enacted a statute that made it illegal for an innocent consumer to pay unearned fees based on an assumption that federal and state regulators would use appropriate discretion not to pursue such claims. A more natural reading of section 8(b) is that there must be two culpable actors involved.

Second, petitioners' argument that RESPA section 8(b) reaches unilateral pricing is also at odds with RESPA's statutory purpose, context, and legislative history. Petitioners view RESPA as if it was intended to eliminate *all* unearned fees and high settlement service pricing. As respondent and the various courts of appeals have noted, Congress expressly rejected proposals to impose price caps or regulate the level of settlement service pricing. To the extent Congress was concerned with lowering "unnecessarily high settlement charges" that concern was expressly limited to such charges "caused by *certain* abusive practices that have developed *in some*

areas of the country." 12 U.S.C. § 2601(a) (emphasis added). Moreover, those "certain abusive practices" refer specifically to kickbacks and referral fees. *See* 12 U.S.C. § 2601(b)(2). Yet petitioners in effect read RESPA's statutory purpose erroneously as covering *"any"* or *"all"* abusive practices despite the more measured language in the statute. While there is discussion or reference to unearned fees in the legislative history, there is no definition of that term and, in context, it references improper kickbacks or fee splitting or sharing between two or more settlement service providers where one performed no work. Thus, the language of section 8(b) addresses in a different way the same concern caused by kickbacks and/or avoids circumvention of the kickback and referral fee provision, by also prohibiting fee splitting or sharing where no services were provided for the fee, even absent proof of a referral or an explicit agreement to pay kickbacks.

2. Petitioners' request that this Court defer to HUD's 2001 Policy Statement[3] interpreting section 8(b) of RESPA also has no merit. Respondent has already noted the procedural infirmities associated with the Policy Statement and the risks of permitting agencies to unilaterally expand the scope of statutes and legislate standards that will be privately enforced, with treble damage remedies, without appropriate safeguards.

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[3] Real Estate Settlement Procedures Act Statement of Policy on Section 8(b) 2001-1 ("Policy Statement"), 66 Fed. Reg. 53,052 (Oct. 18, 2001)

Those objections aside, HUD's Policy Statement on section 8(b) should be rejected simply because it is wrong, inconsistent with Congressional intent, and of no persuasive value. This is best illustrated by the fact that the Policy Statement reads section 8(b)'s scope as reaching a variety of pricing practices including direct overcharges or unilateral pricing that (HUD or some jury deems) is excessive or unreasonable.

Every court of appeals to have considered this issue (now numbering seven) has agreed that RESPA and section 8(b) were never intended to regulate overcharges and excessive settlement service pricing. Moreover, HUD viewed the other forms of service provider pricing which it made subject to section 8(b)'s restrictions—*e.g.* markups, charging for duplicative services, or only offering nominal services—as legally indistinguishable from each other and from excessive pricing. In short, HUD's section 8(b) Policy Statement is unsupportable and undeserving of any deference.

3. The interpretation of section 8(b) proposed by petitioners and HUD has led to many, and will lead to further, anomalous legal decisions in which permissible price increases and alleged failures to provide the correct level of service have been found actionable under section 8(b). This is because, while petitioners and other plaintiffs suggest that they are not asking courts to regulate excessive or unreasonable pricing, they challenge fees for only "nominal" services, or "duplicative" services, or ask whether services added to a third party charge are worth the additional fee that was levied. In practice, such distinctions are illusory and, when courts have

tried to apply them, the results are implausible, illogical and difficult if not impossible to reconcile.

Examples, discussed in detail in Part III, include challenges to flat fee components of brokerage commissions (even when disclosed to customers) and challenges to various charges for title and closing services.

In sum, the problem with petitioners' position is that neither the statutory text of section 8(b) nor the overall purpose of RESPA and section 8 suggest that RESPA was intended to address all perceived pricing ills in real estate services. Rather, RESPA was intended to increase the disclosure consumers received and to prohibit certain limited abusive practices—namely kickbacks and fee splitting where no services were performed. Congress realized that price regulation and caps bore their own set of problems, which is illustrated by application of petitioners' view and HUD's position on section 8(b).

ARGUMENT

I. INTERPRETING SECTION 8(b) TO REACH UNILATERALLY IMPOSED CHARGES ON CONSUMERS IS INCONSISTENT WITH THE STATUTORY LANGUAGE, RESPA'S PURPOSE, AND ITS LEGISLATIVE HISTORY.

A. Petitioners' Interpretation Of Section 8(b) Contravenes The Plain Language Of The Statute And Results In An Illogical Reading Of That Text.

Amici agree with respondent that it is clear from the text of section 8(b) that there must be two culpable actors (a giver and an acceptor) for there to

be a violation. That is why, as the court below and other courts have recognized, Congress used the word "and"—"No person shall give and no person shall accept"—rather than "or."[4] Thus, in the words of the Fifth Circuit, section 8(b) "was clearly aiming at an exchange or transaction, not a unilateral act." Petitioners' Appendix ("Pet. App.") 7a (citation omitted).

Petitioners assert that, even if section 8(b) contemplated both a giver and an acceptor, "Quicken required petitioners to 'give' the fees, and Quicken indisputably 'accept[ed] them.'" Pet. Br. at 21. However, as other courts have highlighted, that would create the absurd result that the consumer him or herself would be liable under the act for paying the charge in question. *See, e.g., Krzalic*, 314 F.3d at 879; *Boulware*, 291 F.3d at 265.

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[4] *See Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 803 (5th Cir. 2010), Pet. App. 7a ("the language of RESPA § 8(b) is unambiguous and does not cover undivided unearned fees"); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, (8th Cir. 2003) (Section 8(b) "is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute....the plain language of [section 8(b)] requires plaintiffs to plead facts showing that the defendant illegally shared fees with a third party."); *Krzalic v. Republic Title Co.*, 291 F.3d 875, 879 (7th Cir. 2002); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 265 n.3 (4th Cir. 2002). Even more likely, if only one culpable party were required, Congress would have chosen language, consistent with other sections of RESPA, that provides "[n]o fee shall be imposed or charge made upon a person," 12 U.S.C. § 2610, in this case, other than for services actually performed. *Cf.* 12 U.S.C. § 2607(c) (using similar language).

Petitioners suggest that it is not possible for consumers to be held liable under section 8(b) because "a consumer will always intend to pay the fee for services that are actually performed," Pet. Br. at 21 n.16, and because a person violating section 8(b) is only liable for treble damages "to the person or persons charged for the settlement service," Pet. Br. at 21 n.16 (*quoting* 12 U.S.C. § 2607(d)(2)). These arguments overlook two key facts.

First, nowhere in section 8(a) or 8(b) is there is any requirement to show a person's "intent" to violate the law.[5] Rather, section 8 of RESPA contains an objective standard—i.e., has a fee been paid in exchange for a referral; has a fee been split (or, under petitioners' view, has a fee been charged) where no services were performed.[6] Similarly, under

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[5] The only reference to any intent requirement in section 8 of RESPA is found in section 8(c)(4)(a), which excuses a person from complying with the normal disclosure requirement needed to establish the affiliated business arrangement exemption "if they "prove by a preponderance of the evidence that such violation was not *intentional* and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error." 12 U.S.C. § 2607(c) (emphasis added). Though not generally altering the objective standards in section 8, 12 U.S.C. § 2617(b) provides that actions taken in good faith conformity with a HUD rule, regulation or interpretation can provide a defense to a RESPA claim.

[6] The Eighth Circuit in *Glover v. Standard Federal Bank*, 283 F.3d. 953, 963-64 (8th Cir. 2002), noted the objective nature of section 8 and took issue with the Eleventh Circuit's decision in *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001). In *Culpepper*, the court erroneously suggested that an intent standard applied, under which if a lender made payments for the purpose of obtaining a referral, there was no need to see

section 8(c)(2) of RESPA, if a fee is reasonably related to the provision of a service, good or facility, then the payment is automatically exempt from section 8(a)'s and (b)'s prohibitions. That is because, if paid for such a service, good or facility, then it could not have been paid for a referral or for no services, regardless of what the person was thinking, intending, or trying to accomplish.

Second, as a result of the lack of any intent requirement, RESPA is among the few federal statutes in which the standards for civil liability and criminal liability are the same. *See also United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-518 (1992). Thus, in addition to the treble damages provision cited by petitioners (Br. at 21 n.16), "[a]ny person or persons who violate the provisions of this section [2607] shall be fined not more than $10,000 or imprisoned for not more than one year, or both." 12 U.S.C. § 2607(d)(1). Moreover, HUD, the Attorney General of any State, and State Insurance Commissioners, have the power to enjoin parties, including apparently consumers, who violate section 8. *See* 12 U.S.C. § 2607(d)(4). In other words, under petitioners' interpretation of section 8(b), if it could be said that the consumer would not owe him or

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whether services were provided and whether they were reasonable in amount. *Id.* at 964. The Eighth Circuit correctly held that this interpretation clashed with section 8(c), which plainly provides that reasonable payments for services were not prohibited regardless of their purpose. The Eleventh Circuit itself ultimately overruled *Culpepper* in its later decision of *Heimmerman v. First Union Bank Mortgage Corp.*, 305 F.3d 1257, 1263-64 (11th Cir. 2002).

herself treble damages under 12 U.S.C. § 2607(d)(2), the consumer would still violate the act and be subject to fines and imprisonment under 12 U.S.C. § 2607(d)(1) or injunctive relief under 12 U.S.C. § 2607(d)(4).

Petitioners' and their amici's argument that regulators and the government would never imprison or enjoin consumers who paid unearned fees misses the point. Congress should not be presumed to have enacted a statute making it illegal for an innocent consumer to pay unearned fees because of its assumption that federal and state regulators would use appropriate discretion not to pursue those violations of the statute. The expansive reading of the statutory text proposed by petitioners makes no sense. The much more "natural reading" of section 8(b)[7] is that there must be two culpable actors splitting the funds, not simply a unilateral charge paid by an innocent consumer.

Finally, the efforts by petitioners and their amici to suggest that if Congress wanted only to prohibit fee splits, it would have used clearer language sounds like the plea of someone who "doth protest too much." It is inconceivable that if Congress wanted to prohibit all unearned fees (which it plainly did not), Congress would have used the language contained in section 8(b). Rather, if that were the intent, Congress would

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[7] *See, e.g., DePierre* v. *United States*, 131 S. Ct. 2225, 2226 (2011) (interpreting the statute consistent with its "most natural reading"); *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1892 (2011) (giving the text "its most natural reading").

have simply indicated that imposing, charging, or accepting "any amount of any charge" without performing a service was sufficient to support a violation, or it would have defined unearned fees broadly and prohibited them, as HUD, usurping its authority, tried to do in its Section 8(b) Policy Statement. *Cf.* 12 U.S.C. § 2610 (discussed *supra* note 4.)

B. Petitioners' Position On Section 8(b) Is Contrary To RESPA's Purpose, Its Context, And Legislative History.

Petitioners and their amici frequently quote RESPA's expressly stated purpose to protect consumers from "unnecessarily high settlement charges caused by *certain* abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a) (emphasis added). However, they clearly want to read that language to support regulation of what they consider to be "*any*" abusive practices. But RESPA's "certain abusive practices" refers specifically to "the elimination of kickbacks and referral fees." 12 U.S.C. § 2601(b)(2).

To be sure, while petitioners note that a 1974 Senate Report refers to the statute's prohibition of "unearned" fees (Pet. Br. at 26), there is no definition of that term and the reference seems at most to have simply referred to nothing other than the language contained in section 8(b)—the meaning of which is being debated in this case. Other references in the legislative history to "unearned" fees or commissions make clear that this word was used in the context of kickbacks, referrals or fee splitting paid by one

settlement service provider to another party that did no work.[8] Indeed, as the Fifth Circuit observed below, "Section 2601's purpose statement does not . . . even hint about a general prohibition on overcharges or unearned fees or other forms of price abuse. If Congress meant to ban other forms of price abuse, such as undivided unearned fees or unearned fees generally, then surely it would not have used such limited language." *Freeman*, Pet. App. 10a-11a.

Petitioners and their amici also improperly focus on the goal to protect consumers from unnecessarily high settlement costs and argue that respondent's interpretation would contravene rather than promote this purpose. *See, e.g.*, Pet. Br. at 25-27. But this argument attaches no significance to Congress's decision at the passage of the statute, and then after receipt of HUD's 1981 report,[9] to deliberately eschew

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[8] *See, e.g.*, S. Rep. No. 93-866, at 6 (1974); H.R. Rep. No. 93-1177, at 7 (1974); *see also* S. Rep. No. 93-866, at 6 (discussing examples, all of which include two separate culpable actors); 120 Cong. Rec. 29,442 (Aug. 20, 1974) (statement of Rep. Blackburn, co-sponsor of the House bill, explaining that what is now section 8(b) did not apply to charges paid by the "homebuyer or seller," but was intended to "deal with fee-splitting . arrangements among participants in the settlement process . . . even though the person who gets the portion, split or percentage has not done any legitimate work").

[9] Indeed, a 1981 HUD Report recognized that section 8(b) does not apply to undivided unearned fees as it summarized section 8 as only "prohibit[ing] certain fee-splitting and referral fees" and made no reference to undivided, unearned fees. *See* David A. Crowe, et al., U.S. Dep't of Housing & Urban Dev., Report to Congress on the Need for Further Legislation in the Area of Real Estate Settlements, I-15 (1981).

imposing price ceilings or caps on settlement service prices which surely would have promoted this goal It also ignores Congress's purpose of prohibiting only "certain abusive practices." *See NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) ("[S]tatutes have limits" and one "cannot discover how far a statute goes by observing the direction in which it points.").

RESPA was not intended to be a panacea to protect against all consumer abuses in residential real estate settlements. *See, e.g., Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269 (7th Cir. 1985) (Easterbrook, J.) (holding lender's service failure and imposition of new fees on borrower was a transparent and improper attempt to transform section 2607(b) into a general mortgage loan antifraud provision).[10] Both Congress's statement of purpose for RESPA and its rejection of price controls in favor of improving disclosures and eliminating market distorting

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[10] Indeed Judge Easterbrook's analysis, set out in this note, runs true:

> Doubtless RESPA is a broad statute, directed against many things that increase the cost of real estate transactions. Full enforcement of its provisions will assist the buyers of houses. But the objective of a statute is not a warrant to disregard the terms of the statute. Congress always has some objective in view when it legislates, and it is always possible to move a little farther in the direction of that objective. The fact that Congress has pointed in a particular direction does not authorize a court to march in that direction without limit. The language and structure of the statute establish how far to go.

763 F.2d. at 271.

behavior prove this point. Numerous other protections exist to deal with problems that RESPA does not, including the supposed improper and unfair pricing alleged in this and many other section 8(b) cases. For example, such conduct can be addressed through common law fraud claims and claims under state unfair and deceptive trade practices acts, pursued by private individuals and the respective state's Attorney General. *See, e.g., Krzalic*, 314 F.3d at 881 (noting that "if there is a fraud here, there are plenty of legal remedies, though none so far as we know under RESPA").[11] In addition, the new Dodd-Frank legislation now gives the CFPB broad and sweeping federal powers to regulate and punish "unfair, deceptive or abusive" acts or practices. *Dodd-Frank Wall Street Reform & Consumer Protection Act*, Pub. L. No. 111-203, § 1031, 124 Stat. 1376, 12 U.S.C. § 5531.

Section 8(b), for its part, was not intended to be the broad regulatory tool into which HUD in its Policy Statement attempted to convert it. Section 8(b)'s prohibition on fee splits for so-called unearned fees (fees for which for no services were performed)

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[11] These claims can be pursued under state statutes in many of the states that joined the State Amici Brief in this case. *See, e.g., Wash. Mut. Bank. FA v. Super. Ct.*, 89 Cal. Rptr. 2d 560 (Ct. App. 1999) (applying California statutory law to allegedly inflated settlement charges for real estate mortgages); Alaska Stat. § 45.50.471 (prohibiting same, and covering "transaction involving an indebtedness secured by the consumer's residence," Alaska Stat. § 45.50.561(a)(9)); Ariz. Rev. Stat. § 44-1522 (prohibiting deceptive acts involving the sale of real estate, Ariz. Rev. Stat. § 44-1521(5)).

was merely another form of kickback—a fee split where there was no obvious referral but a payment to a third party where no service was provided, thereby raising suspicion that a kickback had occurred. Indeed, why else would such a payment be made?[12]

In short, petitioners and HUD are attempting to expand a narrow prohibition that was supposed to complement the anti-kickback provision and avoid circumvention into a comprehensive price regulation mechanism that Congress explicitly rejected. The more limited purpose is evident from RESPA's expressly stated statutory purpose, the parallel language utilized in sections 8(a) and 8(b), as well as by the extensive legislative history discussed by respondent and courts of appeals addressing the issue,[13] with which Amicus agree and do not repeat here.

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[12] In fact, the interplay between sections 8(a) and 8(c) operate in a similar way. Section 8(a) prohibits payments for the referral of business, but section 8(c) automatically exempts payments that bear a reasonable relationship to the value of some good, service, or facility provided. *See* 12 U.S.C. §§ 2607(a) and (c). The thinking is that if the payment is reasonably related to a good, service, or facility, then it is not being made for the referral of business. By contrast, if it exceeds the reasonable value range of one of those things, then it could suggest that it is for the referral of business, if referrals are being made.

[13] Resp. Br. at 27-35; *see also Freeman*, Pet. App. 11a n.9; *Kruse*, 383 F.3d at 56-57.

II. NO DEFERENCE SHOULD BE GIVEN TO HUD'S 2001 HUD POLICY STATEMENT ON SECTION 8(b) BECAUSE IT IS INCONSISTENT WITH THE STATUTE AND ITS LEGISLATIVE HISTORY, BECAUSE IT IS UNPERSUASIVE.

In its 2001 Policy Statement, HUD purported to greatly expand the scope of section 8(b) to cover any fee that could be argued to be "unearned." *See RESPA Statement of Policy 2001-1*, 66 Fed. Reg. 53,052 (Oct. 18, 2001). Thus, HUD asserted, *inter alia*, that section 8(b) does not require a fee split and that section 8(b) equally applies: (i) where the fee exceeds the reasonable value of the services provided; (ii) where one provider marks up the price charged to it by another without performing any actual, necessary and distinct services to justify the additional charge; and (iii) where the service for which the fee is charged was "nominal" or "duplicative" of another service provided. *See* 66 Fed. Reg. at 53,057, 53,059. It also found that each of these practices was "indistinguishable" from one another. *Id.* at 53,057.

Putting aside the procedural deficiencies noted by respondent (Brief for Respondent ("Resp. Br.") at 51-58), the Policy Statement merits no *Chevron* or other deference whatsoever since it contradicts the statute and lacks persuasive value. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Specifically, HUD's assertion, as set forth in the Policy Statement, that section 8(b) prohibits overcharging for settlement services is flat out wrong. In fact, every court of appeals to consider the issue has concluded that HUD's position on overcharges is inconsistent with

the statute and should not be followed. *See, e.g.*, *Freeman*, Pet. App. 11a-14a; *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549 (9th Cir. 2010); *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1296-97 (11th Cir. 2008); *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 387 n.3 (3d Cir. 2005); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 56 (2d Cir. 2004); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003); *Krzalic v. Republic Title Co.*, 291 F.3d 875, 881 (7th Cir. 2002); *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 268 (4th Cir. 2002).

Moreover, HUD's error here is not minor or isolated. The interdependence of HUD's flawed view of overcharges and its analysis of splitting fees is also demonstrated by HUD's statement that it regards mark-ups, the split of unearned fees, and mere overcharges as all "*legally indistinguishable*" under section 8(b). 66 Fed. Reg. at 53,057 (emphasis added). Thus one can legitimately ask why this Court should defer to the portion of the HUD's Policy Statement about whether settlement service fees must be split to be actionable, when the Policy Statement's conclusions about overcharges clearly misinterpreted the scope of RESPA and section 8(b) and when, in HUD's own words, overcharging *and* splitting of unearned fees and markups are indistinguishable.

It is primarily because HUD believed that section 8(b) was intended to have the broad scope, that Congress and the courts of appeals have said it does not, that HUD believes section 8(b) must reach undivided fees. Put another way, absent an interpretation that unearned fees under section 8(b)

did not have to be split, HUD could not have challenged conduct involving what it considers to be excessive pricing or the provision of nominal rather than robust services, each of which it improperly sought to attack in the section 8(b) Policy Statement, and each of which the courts of appeals have uniformly held was wrong. *See supra* p. 18 (citing cases).

Accordingly, there is simply no reason and no basis to defer to HUD's position on the section 8(b) fee split issue.

III. PETITIONERS' AND HUD'S VIEW OF SECTION 8(b) WILL LEAD TO, AND HAS LED TO AN ALARMING NUMBER OF ANOMALOUS SITUATIONS AND UNINTENDED CONSEQUENCES, AND IMPROPER AND UNNECESSARY REGULATION OF PROVIDER PRICING.

The problem with petitioners' position is that section 8(b) of RESPA was never intended to be a panacea for all perceived pricing ills—warranted or not. RESPA was intended to increase the disclosure consumers received and to prohibit certain limited abusive practices—namely kickbacks and fee splitting where no services were performed. The state unfair trade practice and consumer fraud laws provide more than adequate mechanisms for policing alleged unfair pricing. Moreover, State Attorneys General, state Insurance Departments, and federal agencies like the Federal Trade Commission, and the new Consumer Financial Protection Bureau have an

arsenal of weapons to address any unfair or deceptive pricing or marketing practices.[14]

Despite all the many potential avenues to challenge supposedly unfair or deceptive pricing, plaintiffs continually bring suit primarily under RESPA, and do so no doubt hoping to avoid the individualized issues of causation and reliance, for example, that may arise in class actions based on fraud or state consumer protection acts. There is also enticement in the form of RESPA's automatic treble damages without any requirement to show injury, which many courts have said section 8(d)(2) of RESPA provides.[15] This pursuit of alleged improper pricing claims under RESPA, based on petitioners' view of section 8(b), requires courts to make impossible distinctions between pricing practices.

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[14] Amici acknowledge that a number of states and the District of Columbia have filed an amicus brief stating they believe broad RESPA enforcement is necessary to achieve pricing regulation. What the State AGs complain about—e.g. inadequate disclosure, last minute imposition of fees at the closing table, and borrowers unaware or unable to contest fees—are not consistent with what Amici understand is the record in this case or with the situations that most section 8(b) cases are concerned. *See, e.g., Busby*, 642 F. Supp. 2d at 1289; *Augenstein v. Coldwell Banker Real Estate LLC*, No. 10-CV-191, 2011 WL 3837096 (S.D. Ohio Aug. 30 2011). Moreover, in any case, those types of cases are plainly covered by the various state unfair and deceptive practice (UDAP), or consumer fraud acts. *See supra* at 14 (citing examples).

[15] *See, e.g., Edwards v. First. Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011) (considering constitutional standing issue, but not statutory construction issue on which the courts of appeals are also divided).

Every court of appeals to address the issue has concluded, despite HUD's Policy Statement, that RESPA does not regulate overcharges or price increases. The cases discussed below, however, demonstrate the absurd, or at least anomalous, results that can follow when courts try to apply what remains of HUD's view of section 8(b)'s scope, which was formulated on the original erroneous proposition that section 8(b) reaches fees that have not been split with another provider.

A. The Case Law Adjudicating Real Estate Broker Imposition Of A Flat Fee Component To Its Brokerage Commission Demonstrates The Unintended Regulation Of Pricing Under Petitioners' View Of RESPA.

It is difficult to reconcile the unanimous view of the courts of appeals that RESPA was not intended to regulate real estate pricing levels or to proscribe price increases, *see supra* p. 18, with the HUD view and Policy Statement assertion that unilaterally imposed fees for which no services are allegedly provided are illegal unearned fees under section 8(b). This difficulty is vividly illustrated in the case law challenging increases in the fees and commissions that real estate brokerage companies have charged. Price increases (when pure) are by definition an increase in price not accompanied by any new service. Nonetheless, such price increases have been attacked as unearned fees and have subjected real estate companies to large treble damage exposure for raising the price of their services when all agree that RESPA does not proscribe price increases.

In *Busby v. JRHBW Realty Inc.* 642 F. Supp 2d 1283 (N.D. Ala. 2009), for example, a leading Alabama real estate broker (RealtySouth), after heavily investing in new technology, products and training which it thought necessary to continue to provide the highest level of service, decided to increase slightly the price or fee that it charged for all its services by $149 a transaction.[16] It accordingly changed its brokerage agreements for buyers to read follows:

> **Broker Compensation**: Client agrees to pay RealtySouth an administrative brokerage commission of $149.00 upon closing, and, for services on the buy-side of the transaction, a commission [generally between 2.5% and 5% of the purchase price of what is purchased].

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[16] RealtySouth explained, as have numerous other brokers, that in order to keep offering top of the line service and to maintain its reputation in the marketplace, it needed to continue to invest in technology, training, and infrastructure. At the same time, its earnings from commission dollars were declining in part because sales agent commission splits were increasing. Rather than trying to mandate an increase in percentage commissions, where a quarter of point increase would involve hundreds of dollars on a $187,000 house (as was in issue in *Busby*) and be split with its agents, a flat $149 fee was sufficient and of course, like all fees, it was negotiable. *See Busby*, 642 F. Supp. 2d at 1289; *see also Busby v. JRHBW Realty, Inc.*, No. 2:04-cv-2799-VEH, 2006 WL 5325733, at *6 (N.D. Ala. July 20, 2006) (Mem. & Order Denying Motion for Class Certification), *rev'd by Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008) (reversing denial of class certification).

Busby, 642 F. Supp. 2d at 1301 (quoting contract).[17]

Plaintiff Busby testified that she understood that "Broker Compensation" meant the money that the broker would receive for its services and that she was agreeing to the terms of the Buyer Agency Agreement.[18] Despite this understanding, Ms. Busby decided to challenge the $149 administrative brokerage commission as an unearned fee under section 8(b) of RESPA after being informed by others that she supposedly had been unfairly charged.[19]

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[17] The brokerage agreement for sellers (not cited in the opinion), similarly provided:

> **Brokerage Fee**: . . . In this Agreement, seller agrees to pay RealtySouth an administrative brokerage commission of $149.00 and a brokerage commission [of between 5% to 10%] for finding a ready, willing and able purchaser to purchase the property upon the terms mentioned or at any price acceptable to the seller, according to the RealtySouth commission schedule.

Copies of the buyer and seller agreements are available through PACER at https://ecf.alnd.uscourts.gov/, *Busby v. JRHBW Realty, Inc., et al.*, Case No. 04-HS-2799-S, Dkt. 144, Exs. C and D (N.D. Ala.).

[18] *See Busby v. JRHBW Realty, Inc.*, No. 2:04-cv-2799-VEH (N.D. Ala. July 20, 2006), Mem. & Order Denying Motion for Class Certification at 28-29, Dkt. 76 (discussing plaintiff's agreement).

[19] *Id.* at 18-19 (discussing role of a former settlement agent with the company who handled Ms. Busby's closing who now is part of her legal team). While, as noted above, the percentage portion and flat fee portion of Ms. Busby's Broker Compensation payment was clearly disclosed in her contract and understood by Ms. Busby, as the total amount of her "Broker Compensation," as was common practice at the time (prior to the new HUD-1

Busby's complaint actually alleged the administrative fee was an illegal price increase. The district court refused to allow the case to proceed based on a "price increase" theory, but permitted the case to continue to the extent plaintiff alleged that the administrative fee was a fee for which no services were provided. *See Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1325 n.6 (11th Cir. 2008) (discussing district court ruling). Plaintiffs' theory was that the flat fee component covered services that previously had been paid for by the percentage commission portion alone. *See Busby*, 642 F. Supp. 2d at 1299.

Ultimately, the district court certified a class of consumers who were charged the $149 portion of their Broker Compensation or Brokerage Fee and granted Plaintiff Busby summary judgment on her section 8(b) claim. *See id.* at 1283 (granting partial summary judgment and discussing procedural history). The court's rationale was that, despite the contract language and testimony, HUD's Policy Statement should be granted deference and there must be a "new" and separate and specific service (that is not "nominal" or "duplicative") provided by the defendant for any flat fee added to the total charges. *See id.* at 1299-1301. In doing so, the court refused to credit evidence in the record that demonstrated the fee was a permissible price increase or surcharge or that it charged for an "array of services" provided by RealtySouth, such that, at a

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form and current guidance from HUD), the two portions of the charge were listed by the closing agent on separate lines of Ms. Busby's HUD-1 settlement form.

minimum, a factual question rendered summary judgment inappropriate. *See id.* at 1289.[20] Thus, based on HUD's 2001 Policy Statement, the court turned a price increase into an actionable section 8(b) claim.

Another example is in *Augenstein v. Coldwell Banker Real Estate LLC*, No. 10-CV-191, 2011 WL 3837096 (S.D. Ohio Aug. 30, 2011), where defendant NRT Columbus charged its customers a total commission package of (1) $199 plus (2) a co-operative commission. The independent title agency closing the transaction labeled the $199 portion of the commission an administrative fee and placed it on a separate line of the HUD-1. *Id* at *1 n.1. NRT's Vice President testified that the $199 "is part of our total commission package" and "goes to defray all expenses." *Id.* at *1. He indicated the fee did not go to cover any specific expense; rather '[i]t's all expenses." *Id.*

The *Augenstein* court first denied a motion to dismiss rejecting defendant's assertion that the $199 fee, which was not split with its agents, could not violate section 8(b). 750 F. Supp 2d 900 (S.D. Ohio 2010). It later awarded plaintiffs' summary judgment on their section 8(b) claim, rejecting the assertion that the fee was a part of the total

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[20] The district court rejected RealtySouth's alternative argument that (if not a pure price increase as disclosed in the contract) the fee was justified by an array of new services (not offered before) that this fee had permitted RealtySouth to offer. The court regarded an array of services argument (as opposed to one that claimed the fee was for a single service) as impermissible under RESPA. *See id.* at 1301.

commission because then (as in a price increase) you would never be able to determine whether any services were provided in exchange for the fees. 2011 WL 3837096 at *3.[21]

Both these decisions were based on adherence to alleged HUD regulations and the HUD 8(b) Policy Statement that purport to regulate the prices of direct, unsplit consumer charges even though RESPA was not intended to impose price ceilings or prohibit price caps. In fact, as demonstrated above, section 8 of RESPA was never intended to apply at all to the unilateral unsplit fees of a settlement service provider and it is HUD's erroneous, but expansive interpretation of section 8(b) that has produced this set of illogical and restrictive decisions. Moreover, there are now numerous other class actions that have

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[21] The rulings in both *Augenstein* and *Busby* were influenced by the manner in which independent closing agents characterized and recorded the fee on the HUD-1 Settlement Statement—i.e., as a separate fee and a separate charge when this was incorrect and Congress did not provide for a private right of action under RESPA for errors appearing on HUD-1 Statements. *See, e.g., Reese v. 1st Metro. Mortgage Co.*, No. 03-2185-KHV, 2003 WL 22454658, at *4 (D. Kan. Oct. 28, 2003) (holding that, unlike other sections of RESPA, there is no private right of action to enforce section 4); *Bloom v. Martin*, 865 F. Supp. 1377, 1383 (N.D. Cal. 1994) (same), *aff'd*, 77 F.3d 318 (9th Cir. 1996); *Wash. Mut. Bank FA v. Super. Ct.*, 89 Cal. Rptr. 2d 560, 566 n.8 (Ct. App. 1999) (same). Moreover, several courts of appeals, including the Eleventh Circuit, have held that there is no private right of action to enforce other sections of RESPA that, like section 4, do not expressly provide for private enforcement. *See, e.g., Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 836 (11th Cir. 2010); *see also Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir. 1997) (same).

challenged similar, perfectly permissible real estate broker pricing.[22]

B. HUD's 8(b) Policy Statement Has Produced Equally Illogical And Erroneous 8(b) Claims Among Title And Closing Service Providers And Mortgage Lenders And Brokers.

Settlement service providers often need access to information and systems provided by others. For examples, lenders often develop sophisticated automated underwriting systems themselves or subscribe to the systems of others (like those offered by Fannie Mae and Freddie Mac) in order to help underwrite loans. Title underwriters and title agents often develop title plants (with computerized title information) or subscribe to the plants of other providers or employ title search firms to produce the information. RESPA never intended to regulate the

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[22] *See, Noall v. Howard Hanna Company*, 750 F. Supp. 2d 833 (N.D. Ohio 2010); *Rambam v. Long & Foster Real Estate, Inc.* Case 2:11-cv-05528-JP (E.D. Pa., filed Sept. 2, 2011); *Falick v. Coldwell Banker Residential Real Estate, LLC* 0:11-cv-61872-WPD (S.D. Fla., filed Aug. 23, 2011); *Peters v. Keyes Co.*, Case 0:10-cv-60162-CMA (S.D. Fla., filed Feb 3, 2010). In addition, several cases have been brought in New Jersey challenging these same type of fees under the New Jersey Consumer Fraud Act. *See, e.g., Skeehan v. Weichert Realtors*, No. L-3759-11 (Super. Ct. of N.J. Law Div., Camden County, filed July 27, 2011); *Blasini v. Prudential Real Estate Affiliates, Inc.*, No. L-0989-11 (Super. Ct. of N.J. Law Div. Burlington County, filed Mar. 16, 2011); *Probola v. Long & Foster Real Estate, Inc.*, No. L-2269-11 (Super. Ct. of N.J. Law Div. Mercer County, filed Sept. 7, 2011).

manner in which the employment of these services were priced.

Often, lenders or title companies will pay flat fees for access to these systems. On other occasions, they may pay flat access fees and per transaction charges, or simply per transaction charges. In addition to accessing the system, the service providers incur the labor cost of employees who access the system and of others who use the information extracted in making loans or issuing title policies. Read as petitioners do (i.e., in accord with the Second and Third Circuit decisions in *Kruse* and *Santiago*), section 8(b) would permit lenders and title companies who develop and own these systems themselves to charge whatever they like for the service or the cost of their ultimate product. However, if a lender or title company purchases part of the service from a third party, under petitioners' view the price charged apparently has to be reasonable in relation to the cost of the service purchased.

Under this view, a provider can not (a) charge for nominal services (b) can not mark up the price paid for a third party service purchased unless the markup is somehow reasonable vis-à-vis the additional input provided; and (c) simply cannot charge for a service previously included without a separate charge as the fee would now be duplicative of what the old charge covered or would be excessive or unreasonable. In effect, the provider cannot even make a profit by charging more for the services provided than they cost or else that profit is subject to second guessing and/or regulation by courts, juries and HUD.

These rules are illogical and unenforceable. When courts try to apply them, the results make no sense. This is because, as HUD recognized in its Policy Statement, all three courses of conduct (i.e., overcharges, mark-ups and nominal service/duplicative fees) are at least very similar and in HUD's view indistinguishable from each other. In straining to give the overreaching HUD Policy Statement some effect, however, courts have tried to distinguish between these situations, reaching decisions that if not facially implausible, certainly cannot be easily reconciled. The reason is that section 8(b) was never intended to reach unilateral provider pricing or charges that were not then split with another for which no services were performed.

For example, in *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003), Chase charged the borrowers $50 for a courier service that it had contracted out to a third party at a far lower cost. Plaintiffs sued and claimed the fee was an illegal mark-up. The district court, which correctly read section 8(b) of RESPA as not reaching unearned fees that were not split with third parties, dismissed the case. On appeal, the Eleventh Circuit said in dictum[23] that it believed section 8(b) could reach unearned fees that were not split—a position that HUD argued for in an amicus brief.[24] While ruling

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[23] In *Friedman*, a panel of the Eleventh Circuit appropriately queried (without deciding) "whether the language in *Sosa* is controlling or is dicta." *Friedman*, 520 F.3d at 1292. The fee split language in *Sosa* was not central to the court's holding. *See Sosa*, 348 F.3d at 983-84.

[24] Br. for the United States as Amicus Curiae, *Sosa v. Chase*

with HUD on this point, the Eleventh Circuit refused to defer to the HUD 8(b) Policy Statement which required among other things that services used to justify a marked up fee could not be "nominal." Instead the court permitted the $50 mark-up that Chase had imposed because it made arrangements (i.e., it made a phone call or sent an email) for the pick-up by the courier and this activity, while plainly nominal, was a service that Chase provided. *Sosa*, 348 F.3d at 983-84. Thus the Eleventh Circuit affirmed the dismissal of the markup on alternative grounds. *Id.* at 984.

By contrast, in *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004), the Second Circuit found that an underwriting charge made by a lender that was as much as twenty-five times the alleged twenty dollar value of the service, *id.* at 53, was not actionable under section 8(b) because it was a direct charge and RESPA was not intended to regulate the price level of direct charges. *Id.* at 56. At the same time the court held that markups that the lender made of third party "tax services, flood certification, and document preparation" work services, which charged six or seven times the amount of the third party charge, *id.* at 53, could be challenged under section 8(b) even if the lender provided some additional service but did not otherwise comply with the HUD 8(b) Policy Statement that the *Sosa* court had refused to apply, *id.* at 61-62.

Manhattan Mortgage Corp., 348 F.3d 799 (11th Cir. 2002) No. 02-13930-DD, 2002 WL 32366238 (supporting reversal in *Sosa*).

Kruse cannot be squared with *Sosa* and *Kruse*'s holding permitting the underwriting charge at twenty-five times the cost, but subjecting the mark-up to the scrutiny called for by the HUD Policy Statement, makes no sense. Assuming *arguendo* that Chase developed the underwriting system itself[25] and therefore could charge whatever it wanted for the underwriting, why would RESPA place an onerous set of pricing regulations for the same service on another lender that had to license the underwriting software or purchase the underwriting service from a third party? While HUD was wrong about RESPA's intent to regulate the direct pricing of services to consumers, its' view that markups, charges for nominal services, and charges that were viewed as unreasonable, excessive, or duplicative were difficult to distinguish has proved prescient.

Thus, those courts who treat unsplit fees as actionable under section 8(b) end up rendering decisions predicated on distinctions that HUD did not believe should be distinguished, with the result that there is no clarity or reason being applied to settlement service pricing.

Additional examples abound. As in *Mercado*, consumers dissatisfied with the service offered by a settlement service provider under petitioners' or HUD's view can bring section 8(b) claims for unearned fees. Indeed, plaintiffs have asserted to

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[25] The decision states that the underwriting system contained Fannie and Freddie software, 383 F.3d at 53, which makes it unclear why the charge was viewed as direct rather than a mark-up.

Amici's members who offer standard and enhanced title polices with different levels of coverage at regulated prices that the enhanced policy is not worth the supposed better coverage and therefore that the charge paid for the enhanced policy is unearned and violative of section 8(b). *Cf. Arthur v. Ticor Title Ins. Co.*, No. AMD 07-1737, 2008 WL 7854915, at *1 (D. Md. March 11, 2008) (asserting RESPA claims and alleging that defendant charged plaintiff "for an unnecessary policy (a "Lender's Extended" policy) that required [plaintiff] to pay an additional title insurance premium of 20% above the standard issue rate").

Closing agents who used to include copying or document storage as part of their standard closing fee and who then decide to break out those services and charge separately for them may be vulnerable to a section 8(b) unearned fee claim because the service was previously provided for free but now is drawing a charge that consumers may feel is duplicative and do not like.

In the context of RESPA, what is the difference between an overcharge, which all agree is not actionable under section 8 of RESPA, and charging a fee for a service that in some way may be arguably duplicative or overlap with another charge? *See, e.g., Cohen v. JP Morgan Chase & Co.*, 608 F. Supp. 2d 330, 341 (E.D.N.Y. 2009) (citing "duplicative" charges are not actionable); *Edwards v. Accredited Home Lenders, Inc.*, No. 07-0160, 2008 WL 2952075 (S.D. Ala. July 29, 2008) (same).

C. The Argument That Respondent's Interpretation Of Section 8(b) Leads To Absurd Results Is Misguided.

Failing to acknowledge the absurd results described above that result from efforts to apply section 8(b) to unilateral pricing and efforts to apply the HUD Policy Statement to unsplit fees, petitioners and their amici argue that respondent's interpretation would lead to absurd consequences. Specifically, they assert that there was no sound reason for Congress to only prohibit fee splits and for carving out an exception that would allow brokers and lenders to charge unearned fees as long as they kept them to themselves rather than split them. *See e.g.*, Brief for Petitioners ("Pet. Br.") at 27; Brief for the States of California, et al., as Amici Curiae in Support of Petitioners ("State AG Brief") at 21; Brief for the United States as Amicus Curiae Supporting Petitioners ("Gov't. Br.") at 11.

But this is precisely what Congress did and this action makes perfect sense when one realizes that Congress expressly rejected the proposals advocated by Senator Proxmire and others to directly regulate the prices of real estate services. It instead put in place a statute that would increase disclosures of pricing, facilitate shopping, and prohibit a narrow set of practices (kickbacks and fee splitting for no services) that could render disclosures ineffective.

If, as all acknowledge, Congress had no intent to regulate real estate pricing, then a decision not to prohibit excessive pricing—be it a markup, an excessive fee, or a charge for a nominal service or duplicative service—was and is the correct decision. Kickbacks were prohibited because they were abusive

and did not permit the market to function. And, a fee split for so-called unearned fees were merely another form of kickback—a fee split where there was no obvious referral but a payment to a third party where no service was provided, thereby raising suspicion that a kickback had occurred. *See supra* pp. 15-16. There are no absurd results that follow from this view because Congress was focused on a narrow set of practices (poor disclosures and kickbacks and fee splits for no services) that were distorting the market for real estate services. There was never any intention for RESPA to solve all perceived pricing problems. Congress realized that price regulation and caps bore their own set of problems, which application of petitioners' view and HUD's position on section 8(b) have plainly set in motion and, respectfully, this Court should halt.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

January 10, 2012

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AMICUS CURIAE BRIEF

No. 10-1042

In The Supreme Court of the United States

TAMMY FORET FREEMAN, et al.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, ALASKA, ARIZONA, CONNECTICUT, GEORGIA, HAWAI'I, IDAHO, ILLINOIS, IOWA, MAINE, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, RHODE ISLAND, TENNESSEE, WASHINGTON, WEST VIRGINIA, AND WYOMING AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

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INTEREST OF AMICI CURIAE

The Amici States and the District of Columbia have a compelling interest in ensuring the proper interpretation and enforcement of consumer protection laws such as the Real Estate Settlement Procedures Act of 1974 (RESPA), which protects consumers from abusive practices in the mortgage lending industry that lead to unnecessarily high closing costs for mortgage loans. Additionally, RESPA expressly grants state Attorneys General and insurance commissioners a longer limitations period (3 years) than private litigants (1 year) to enforce violations of 12 U.S.C. § 2607, making state enforcement essential in many cases. *See* 12 U.S.C. § 2614.

STATEMENT OF THE CASE

1. Congress enacted RESPA "to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the [mortgage loan] settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). In furtherance of these objectives, RESPA provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." *Id.*, § 2607(b).

As authorized under 12 U.S.C. § 2617(a), the Secretary of the Department of Housing and Urban Development (HUD) has promulgated regulations interpreting § 2607(b). Those regulations state in relevant part that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [§ 2607]." 24 C.F.R. § 3500.14(c). In 2001, HUD issued a Statement of Policy in which it "reiterate[d] its long-standing interpretation" that § 2607(b) "prohibits any person from giving or accepting any fees other than payments for goods and facilities provided or services actually performed," including cases where "one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done." Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052, 53052, 53053 (Oct. 18, 2001) (Statement of Policy); *see also id.* at 53057 (HUD "specifically interprets [§ 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.").

2. Petitioners are three couples who brought lawsuits under § 2607(b) alleging that respondent, Quicken Loans, Inc. (Quicken), charged them "loan discount fee[s]" of approximately $980, $1,100, and $5,100, respectively, yet failed to provide any loan discount or other service in exchange for these fees.

The district court granted summary judgment for Quicken, and a divided panel of the Fifth Circuit affirmed, holding that § 2607(b) prohibits only kickbacks and referral fees and thus does not prohibit "unearned fees" unless those fees are divided with another party. Pet. App. 1a-18a.

SUMMARY OF ARGUMENT

This Court should reverse the Fifth Circuit and hold that § 2607(b) prohibits real estate settlement service providers from charging unearned fees – *i.e.*, fees for which no service was provided – under all circumstances, regardless of whether the fees were kept entirely by one party or divided with one or more other parties.

Petitioners' brief explains how the text, structure, and purposes of RESPA demonstrate Congress's unambiguous intent to prohibit all unearned fees, whether divided or not, under § 2607(b). Rather than repeating those arguments, Section I of this brief focuses on the practical applications and real-world consequences of abusive unearned fees, and places them in the context of Congress's purposes in enacting RESPA. Section II analyzes the text of RESPA and demonstrates why only petitioners' argument is consistent with the text of § 2607(b) and congressional intent.

1. A straightforward, textual application of § 2607(b) is essential to protecting consumers from

unearned fees that unnecessarily inflate closing costs. First, unearned fees under § 2607(b) are *by definition* abusive. Section 2607(b) does not regulate rates or otherwise tell brokers or lenders how much they can charge for services actually provided. Instead, it prohibits them from charging fees for which *no services were actually provided*. As reflected in the record below, lenders and brokers currently engage in numerous practices that can result in an unearned fee, such as charging "discount points" without providing any actual discount. The fact that only one entity may be involved in some of these practices does not change their nature: they are unearned fees and, as such, precisely the type of practice that Congress sought to preclude when it enacted RESPA.

Second, these types of fees can be tremendously harmful to borrowers and can have profound negative effects on the overall mortgage and housing markets. As the "loan discount fees" of $980, $1,100, and $5,100 in this case show, the unearned fees that many borrowers pay – for which they get nothing in return – can be quite significant. And even seemingly small fee increases can make a difference in whether many potential borrowers can afford a home, thereby burdening an already-troubled housing market. Moreover, unearned fees – particularly unearned yield spread premiums that increase borrowers' interest rates – can greatly increase borrowers' risk of falling into serious financial difficulty, including foreclosure, which can have profound consequences for the real estate market as a whole.

Finally, RESPA's protections are essential for consumers because the complex nature of closing costs, coupled with brokers' and lenders' ability to wait until the last minute to disclose the fees that they are charging, make it far too easy for unscrupulous brokers and lenders to charge unearned fees that borrowers are either unaware of or unable to realistically contest given the high costs to the borrower of having a loan fall through at closing.

2. The most natural reading of the text of § 2607(b) is to prohibit all unearned fees. The prohibition is written in broad terms that do not indicate any intent to carve out an exception for undivided unearned fees. The structure of RESPA strongly supports this interpretation, as § 2607 is titled "Prohibition against kickbacks and unearned fees." Section 2607(a) expressly prohibits kickbacks, thus indicating that § 2607(b) serves an independent function of addressing unearned fees. RESPA's legislative history further confirms this reading, as the Senate Report expressly states that Congress intended RESPA to eliminate the payment of "unearned fees."

Moreover, interpreting § 2607(b) to prohibit all unearned fees is the only interpretation that is consistent with RESPA's core purpose of preventing abusive lending practices that unnecessarily increase closing costs. The Fifth Circuit's contrary interpretation, that § 2607(b) prohibits unearned fees only when they are divided with a third party, would undermine RESPA's core objectives and open a gaping hole in the statute's consumer-protective umbrella. It

would make no sense for Congress to have carved out an exception allowing brokers and lenders to charge unearned fees so long as they keep them entirely for themselves, as the harm to the consumer – and the abusiveness of the broker or lender's practice – is the same regardless of whether an unearned fee is divided.

In any event, to the extent that § 2607(b) is ambiguous, this Court should accord *Chevron*[1] deference to HUD's regulation and policy statement interpreting § 2607(b) to prohibit all unearned fees.

ARGUMENT

Congress enacted RESPA to prevent, among other things, abusive practices that unnecessarily inflate borrowers' closing costs. Unearned fees – literally, fees for which no services are provided – are unquestionably abusive and can cause tremendous harm both to borrowers and the real estate market as a whole. The text of § 2607(b) unambiguously prohibits brokers and lenders from charging unearned fees, without exception, and this straightforward interpretation is consistent with Congress's intent to protect consumers from such abusive fees.

[1] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

I. Limiting § 2607(b) to Prohibit Only Divided Unearned Fees Would Undermine RESPA's Consumer Protection Objectives and Have Serious Consequences for Mortgage Borrowers and the Overall Real Estate Market

The Amici States have a compelling interest in ensuring that § 2607(b)'s prohibition of unearned fees is properly interpreted and enforced. Unearned fees by definition lack any legitimate business justification and have serious consequences for the borrowers who end up paying significant amounts of money for services that they do not receive. Beyond that, unearned fees also impact the overall real estate market by introducing unnecessarily high transaction costs for borrowers, reducing the number of potential buyers and putting additional financial burdens on many borrowers who do purchase homes. RESPA's enforcement mechanisms are essential to curtailing and preventing the harms caused by unearned fees, as the complex and asymmetrical nature of mortgage settlement transactions makes it extremely difficult, if not impossible, for the market to self-regulate these abuses.

A. Unearned Fees Are By Definition Abusive.

The unearned fees addressed by § 2607(b) are by definition abusive and lack any legitimate business justification. Section 2607(b) is not a rate-setting statute, nor does it intrude upon brokers' or lenders' ability to obtain a legitimate profit or set whatever rates the market will bear for the services that they

actually perform. Instead, § 2607(b) prohibits *only* genuinely unearned fees, that is, fees for which *no services were actually performed.* Such fees could not exist in any properly functioning market, as "the reasonable fee for nothing is nothing." Pet. App. 18a (Higginbotham, J., dissenting).

As petitioners' cases below demonstrated, unearned fees can be charged by a single party, acting alone, in several contexts. All of these contexts implicate the concerns expressed by Congress when it enacted RESPA, and all of the practices described below are forbidden under a straightforward application of the text of the statute.

1. Discount points without corresponding rate reductions.

The unearned "discount points" or "loan discount fees" that petitioners were charged in this case are a widespread problem in the mortgage lending industry. When used properly, "discount points," "loan discount fees," or similar fees can serve a legitimate business purpose, allowing a borrower to obtain a lower (often below-market) interest rate by paying additional cash to the lender or broker at closing. However, as petitioners' case below demonstrates, such fees are prone to frequent abuses by brokers and lenders who take advantage of borrowers' confusion to charge these fees without providing any reduction in the interest rate or other discount.

These abusive practices are common. For example, a 2008 study of Federal Housing Administration (FHA) loans found that "[o]verall, borrowers see a benefit of only $20 for each $100 of [discount] points paid, for a net loss of $80." Susan E. Woodward, *A Study of Closing Costs for FHA Mortgages*, at x (2008) (report prepared for U.S. Dep't of Hous. & Urban Dev.), *available at* http://www.urban.org/publications/411682.html. Many borrowers "see no benefit at all from paying points, either in lower interest rates or in lower fees with other names." *Id.* A 2007 Federal Trade Commission (FTC) study found that "many borrowers were confused by the current mortgage cost disclosures and did not understand key terms" such as "discount fees." James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, at ES-6 (2007) (Fed. Trade Comm'n Bureau of Econ. Staff Report), *available at* http://www.ftc.gov/be/workshops/mortgage/articles/lackopappalardo2007.pdf. "In practice, it appears that discount points are mainly just another fee charged to borrowers that do not displace other cash fees" and "appear to be charged to borrowers who do not really understand what points are." Woodward, *supra*, at 65. These observations "do not make for a very satisfactory picture of the functioning of our mortgage markets." *Id.* Further, as Quicken's $980, $1,100, and $5,100 "loan discount" charges to petitioners show, consumers' direct losses from unearned discount points can be quite significant.

2. Yield spread premiums without corresponding reductions in up-front costs.

Like discount points, "yield spread premiums" are complex mortgage settlement devices that can have legitimate uses but are prone to abuse by brokers and lenders. Yield spread premiums are essentially discount points in reverse, allowing borrowers to reduce or even eliminate their up-front closing costs by agreeing to pay a higher (typically, above-market) interest rate. However, HUD has specifically noted that "in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread premiums as a way to enhance the profitability of mortgage transactions without offering the borrower lower up front fees." Statement of Policy, 66 Fed. Reg. at 53054. Woodward's 2008 study of closing costs in FHA loans found that "[b]orrowers on average save only $20 in up-front cash for each $100 they pay in yield-spread premium, for a net loss (or extra cost) of $80." Woodward, *supra*, at x. And a 2007 HUD study found "no evidence that FHA borrowers receive any relief in fees when they borrow at above-market rates." Mark D. Shroder, *The Value of the Sunshine Cure: The Efficacy of the Real Estate Settlement Procedures Act Disclosure Strategy*, 9 Cityscape No. 1, at 73, 86 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089448##. Because yield spread premiums take the form of higher interest rates rather than cash paid directly out of pocket, they tend to be

particularly confusing to borrowers and hence more prone to abuse by unscrupulous brokers and lenders.

3. "Junk fees" without any corresponding services provided.

In addition to discount points and yield spread premiums, brokers and lenders also routinely charge unearned fees through an array of difficult-to-decipher "junk fees" that are confusing for borrowers and often bear no relationship to any services actually performed. Common examples include charges for "processing," "administration," "application," "commitment," "courier," "document prep," "origination," and "underwriting," among others. *See* Stephen Gandel, *Closing Cost Scams*, CNNMoney.com, Oct. 10, 2006, *available at* http://money.cnn.com/2006/02/13/real_estate/closingcosts_money_0603/index.htm. As long as these fees are charged for services actually performed, they are generally proper and § 2607(b) is not implicated. When, however, these fees are not related to any services actually performed, they are unearned "junk fees" and there is no justification for brokers or lenders to charge them. *See id.*

B. Creating a Loophole in RESPA for Undivided Unearned Fees Would Cause Tremendous Harm to Many Borrowers and Could Negatively Impact the Overall Real Estate Market.

While unearned fees can appear small in comparison with the mortgages to which they are attached, in absolute terms they are quite significant, and unnecessarily high closing costs hurt not only the borrowers who end up paying for services that they do not receive, but also the real estate market as a whole.

High closing costs can make the difference between whether or not many borrowers can afford to buy a home. As HUD has specifically recognized, "[o]ne of the primary barriers to homeownership and homeowners' ability to refinance and lower their housing costs is the up front cash needed to obtain a mortgage." Statement of Policy, 66 Fed. Reg. at 53053. "[C]losing costs and origination fees" are a "significant component of these up front cash requirements." *Id.*; *see also* Woodward, *supra*, at 40 ("[S]ettlement costs are a substantial burden of buying a home.").

Additionally, even if a borrower is able to purchase a home, high closing costs can cause financial difficulties down the road – including an increased risk of foreclosure – by leaving the borrower with less cash on hand for future emergencies, an above-market interest rate for the life of the loan, or both.

"If consumers do not understand the costs and terms of their mortgages, they may pay more for their mortgages than necessary, obtain inappropriate loan terms, fall prey to deceptive lending practices, and experience unpleasant surprises and financial difficulties during the course of their loans." Lacko & Pappalardo, *supra*, at ES-12; *see also id.* ("The results of the study show that current mortgage disclosures fail to convey key mortgage costs and terms to many consumers, leaving them susceptible to these problems.").

When these problems occur repeatedly on a grand scale, they affect the entire real estate market by reducing the number of potential home buyers and increasing the number of distressed properties. "[L]ending and title fees are large in absolute terms, [and] have a structure that may distort the housing market." Shroder, *supra*, at 81. And even small changes in closing costs can make a significant difference. For example, a 1996 study by Freddie Mac estimated that just a $400 decrease in closing costs could increase the number of families who qualify to buy a home nationwide by approximately 70,000. *See* Peter E. Mahoney & Peter M. Zorn, *The Promise of Automated Underwriting: Providing a Simpler, Fairer, More Inclusive Mortgage-Lending System*, 1996 Mortgage Market Trends 18, 22 (1996), *available at* http://www.freddiemac.com/finance/smm/nov96/pdfs/mhnyzorn.pdf.

The problems caused by unnecessarily high closing costs are particularly acute today, as we find

ourselves in the midst of an ongoing foreclosure crisis and a protracted slump in the nationwide real estate market. While unnecessarily high closing costs are only one piece of a larger puzzle, they have contributed significantly to these problems and have risen dramatically in recent years. For example, it was reported in 2006 that homebuyers at that time paid *eight times* more in closing costs than they did forty years earlier. *See* Gandel, *supra*; *see also* Elizabeth Renuart & Jen Douglas, *The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures*, 22 Housing Policy Debate (forthcoming 2011-2012) (manuscript at 30) (finding that the cost of closing a mortgage as a percentage of the loan amount has risen by more than 418% since 1972), *available at* http://ssrn.com/abstract=1635841. A recent survey from a leading industry analyst showed that closing costs jumped 8.8% nationwide between 2010 and 2011. *See* Polyana da Costa, *New York, Texas Have Highest Closing Costs*, bankrate.com, July 18, 2011, *available at* http://www.bankrate.com/finance/mortgages/2011-closing-costs/. For FHA loans, charges for all settlement services (including a real estate agent) now average approximately 10% of the value of the loan, significantly exceeding the average FHA borrower's down payment. *See* Woodward, *supra*, at 40. And closing costs have continued to rise even while many of their underlying component costs have been decreasing. *See, e.g.*, http://www.loanprospector.com/about/ (discussing Freddie Mac's automated underwriting service, Loan Prospector, which provides underwriting for just $20 and is intended to help

lenders "provide more borrowers with the lowest cost financing available").

Finally, high settlement costs and their attendant harms fall disproportionately on minorities, less educated borrowers, and less affluent borrowers. For example, a recent survey of FHA loans found that even "after accounting for other borrower differences," on average "African-American borrowers pay an additional $415 for their loans" and "Latino borrowers pay an additional $365." Woodward, *supra*, at ix. Unexplained differences based on education levels are even more stark, as the survey found that "[o]n average, borrowers who completed college are charged $1100 *less* than borrowers who did not go to college at all, other things equal." *Id.* Similarly, high closing costs "tend to work a disproportionate burden on the least affluent participants in the market." Shroder, *supra*, at 81. While the data does not directly explain the cause of these differences, it appears likely that they result largely, if not entirely, from borrowers with certain characteristics being targeted by predatory brokers and lenders seeking to inflate their profits with unearned fees. *See id.* at 85-86 (finding that borrower characteristics unrelated to loan worthiness or the broker's or lender's costs are a significant factor in the amount of fees charged, and noting that much of this likely results from "exploitation of the buyer's ignorance of the market").

C. RESPA's Protections Are Essential for Consumers Because the Complex and Asymmetrical Nature of Mortgage Transactions Makes it Virtually Impossible for the Market to Self-Regulate.

RESPA's protections are essential for consumers because the complex nature of closing costs, coupled with brokers' and lenders' ability to wait until the last minute to disclose the fees that they are charging, make it easy for unscrupulous brokers and lenders to charge unearned fees that borrowers are either unaware of or unable to realistically contest given the high costs to the borrower of having a loan fall through at closing.

First, the complex nature of mortgage closing costs and the accompanying mass of documents make it difficult for many borrowers to understand the fees they are being charged. Thus, even when such fees are fully disclosed, many borrowers remain unaware that they are being charged unearned fees for which no services are actually provided. As HUD has recognized, "[t]he mortgage transaction is complicated, and most people engage in such transactions relatively infrequently, compared to the other purchases they make." Statement of Policy, 66 Fed. Reg. at 53053. Accordingly, "[t]here is a growing awareness that many consumers struggle to understand the costs associated with the purchase of a home, especially when mortgages have numerous and complex terms." Woodward, *supra*, at viii; *see also id.* at 3 (There is a "bewildering array of different numbers that go into determining the size of the check the buyer must write at closing.").

Based on an empirical study of mortgage disclosures that utilized in-depth consumer interviews, the FTC "found that many borrowers were confused by the current mortgage cost disclosures and did not understand key terms in the disclosure forms," including terms such as the "discount fees" at issue in this case. Lacko & Pappalardo, *supra*, at ES-6; *see also id.* at ES-7 (finding that "[n]early a quarter [of consumers sampled] could not identify the amount of settlement charges," and "[n]early nine-tenths could not identify the total amount of up-front charges in the loan"); Statement of Policy, 66 Fed. Reg. at 53056 ("[T]he Department is aware and has stated that the current GFE/HUD-1 disclosure framework is often insufficient to adequately inform consumers about yield spread premiums and other lender paid fees to brokers."). Accordingly, even when fees are fully disclosed, it is all too easy and common for unscrupulous lenders and brokers to take advantage of borrowers' confusion and charge them unearned fees that result in unnecessarily high closing costs.

Second, even when a borrower is aware of an unearned fee, as a practical matter there is often little the borrower can do to contest it. Such fees are not required to be disclosed until the HUD-1 form is presented at closing,[2] 12 U.S.C. § 2603(b), and thus

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[2] While the broker or lender is required to provide a "good faith estimate" of closing costs within three business days after receiving an application, 12 U.S.C. § 2604(c) & (d), this estimate "need not be provided until after the consumer has applied for a

(Continued on following page)

"[b]orrowers seldom know the complete total of [the various closing] charges until a date very close to the loan closing – often only at the closing itself." Woodward, *supra*, at 3; *see also id.* at 83 ("Many borrowers do not see a [yield spread premium] until their loan closing."). At that point the borrower has little, if any, bargaining power and typically has no practical choice but to accede to the terms offered, as "most borrowers are reluctant to do anything that would jeopardize their loan closing." *Id.* at 83.

Indeed, by the time of closing the borrower's costs of walking away are substantial, as the borrower already will have paid nonrefundable application and appraisal fees; likely will have invested substantial time and energy into searching for a house and obtaining a loan; and – perhaps most significantly – may stand to lose out on the purchase of a unique

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mortgage and may have paid a significant fee." Statement of Policy, 66 Fed. Reg. at 53056. Moreover, there is no effective enforcement mechanism for requiring brokers or lenders to adhere to (or even remain in the same ballpark as) their "good faith estimate," rendering the estimate meaningless in the hands of an unscrupulous broker or lender. *See* Renuart & Douglas, *supra*, at 30 (noting that RESPA's new disclosure provisions still lack an effective enforcement mechanism); Shroder, *supra*, at 82, 86 (finding that while most good faith estimates are fairly accurate, it is "troubling" that in "the minority of cases . . . very large underestimates occur," and hypothesizing from the data that large fees often result from "exploitation of the buyer's ignorance of the market"); *see also* Gandel, *supra* (reporting that one couple was charged $7,320 after receiving a good faith estimate of $4,524).

property if the loan does not close. *See, e.g.*, Statement of Policy, 66 Fed. Reg. at 53056 (noting that the good faith estimate of closing costs "need not be provided until after the consumer has applied for a mortgage and may have paid a significant fee"). The late disclosure of such fees, coupled with the complex and confusing nature of both the fees and the disclosure forms, make the proper enforcement of § 2607(b) essential to protecting borrowers from abusive lending practices. Indeed, it is virtually impossible for such fees to be self-regulated through the market, as borrowers' lack of information and bargaining power all but preclude the possibility of a properly functioning market for lenders and borrowers to freely and knowledgeably negotiate such fees. *See* Woodward, *supra*, at 58, 65 ("The data reveal a market far from the transparent and competitive ideal" and "do not make for a very satisfactory picture of the functioning of our mortgage markets.").

II. Section 2607(b) Prohibits All Charges for Unearned Fees

A. The Text, Structure, History, and Purpose of RESPA Evince Congress's Unambiguous Intent to Prohibit All Unearned Fees Under § 2607(b).

The text, structure, history, and purpose of RESPA demonstrate Congress's clear intent to prohibit all unearned fees, regardless of whether such fees are divided with one or more other parties.

1. The text of § 2607(b) prohibits all unearned fees in mortgage lending transactions, without exception. Specifically, § 2607(b) states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). The most natural reading of this text is that it prohibits brokers and lenders from charging unearned fees under any circumstances, as it forbids (1) any "person" (2) to "accept" (3) "*any* portion, split, or percentage" (*i.e.*, including 100%) of (4) "*any* charge made or received for the rendering of a real estate settlement service" (5) "other than for services actually performed." *Id.* (emphases added).

The Fifth Circuit's contrary reading strains the statutory language. When read in context, the phrase "[n]o person shall give and no person shall accept" is most naturally read to *expand*, rather than limit, the prohibition on unearned fees by ensuring that any person who accepts, passes through, or otherwise is involved in the charging of such fees will be held culpable. Indeed, the rest of the statute's text indicates an intent to sweep broadly, referring to "*any* portion, split, *or* percentage" – which plainly includes 100% – "of *any* charge." *Id.* (emphases added). The Fifth Circuit's narrow focus on the conjunctive "and" in the phrase "[n]o person shall give and no person

shall accept" is misplaced. Pet. App. 7a. While that phrase in isolation is ambiguous and may be *consistent with* a requirement that there be two culpable parties before § 2607(b) can be violated, it does not by itself *impose* such a requirement. Nor does anything else in the statute indicate that Congress intended to impose such a requirement. Moreover, the Fifth Circuit's reading leads to an absurd result, as there is no sound reason for carving out an exception that would allow brokers and lenders to charge abusive unearned fees – *i.e.*, fees for which no services are actually performed – so long as they keep them entirely for themselves.

2. Congress's intent to prohibit all unearned fees under § 2607(b) is reinforced by the statute's structure and context. Section 2607 is titled "Prohibition against kickbacks and unearned fees," and § 2607(a) expressly prohibits "kickbacks." This indicates that Congress intended § 2607(b) to prohibit unearned fees.[3] Moreover, RESPA's statement of congressional purpose supports a robust, rather than limited, reading of § 2607(b). RESPA is broadly intended, *inter alia*, "to insure that consumers . . . are protected from unnecessarily high settlement charges

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[3] The subtitle of § 2607(b) in the United States Code, "Splitting charges," was not part of the bill passed by Congress, but instead was added during the statute's codification. *See* Pub. L. No. 93-533, § 8(b), 88 Stat. 1724 (1974). Accordingly, this subtitle provides no evidence of congressional intent and has no interpretive weight. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

caused by certain abusive practices." 12 U.S.C. § 2601(a).

The Fifth Circuit's structural arguments for limiting § 2607(b) to fee splitting are unavailing. First, the Fifth Circuit held that because §§ 2607(a) and 2607(b) both use the phrase "[n]o person shall give and no person shall accept," and § 2607(a)'s prohibition on kickbacks and referral fees requires two culpable actors, § 2607(b) must also require two culpable actors. Pet. App. 8a. But the requirement of two culpable actors for a violation of § 2607(a) stems not from the phrase "[n]o person shall give and no person shall accept," but rather from the language requiring an "*agreement or understanding*" that one person will refer business to another. 12 U.S.C. § 2607(a) (emphasis added). The harm to be prevented by § 2607(a) is a kickback or referral agreement that *necessarily* requires two culpable parties. Section 2607(b), in contrast, contains no comparable language *requiring* two parties to commit the violation, and the harm to be remedied – a "charge made . . . other than for services actually performed" – can plainly be committed by a single culpable party. *Id.*, § 2607(b).

Second, the Fifth Circuit misinterpreted RESPA's statement of purpose in § 2601 by narrowly focusing on the fact that § 2601(b) explicitly references the "elimination of kickbacks or referral fees" while making no mention of unearned fees. Pet. App. 10a-11a; 12 U.S.C. § 2601(b). But § 2601(b) is not an *exclusive or exhaustive* list of RESPA's purposes. Indeed, the

subsection immediately preceding it expresses a broad overall purpose of protecting consumers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). And construing § 2601(b) as an exhaustive list would place it in direct conflict with RESPA's express prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements. *See id.*, § 2610.

3. RESPA's legislative history further reinforces Congress's intent to prohibit unearned fees. The Senate Report describes RESPA as a bill to, *inter alia*, "eliminate the payment of kickbacks *and unearned fees* in connection with settlement services." S. Rep. No. 93-866, at 1 (1974) (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6546. "The HUD-VA Report and subsequent hearings by the Housing Subcommittee" found that one of the "major problem areas that must be dealt with if settlement costs are to be kept within reasonable bounds" is "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." *Id.* at 1, *reprinted in* 1974 U.S.C.C.A.N. at 6547. RESPA "would proceed directly against the problem areas pointed out above . . . by prohibiting or regulating abusive practices, such as kickbacks, *unearned fees*, and unreasonable escrow accounts." *Id.* at 3 (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. at 6548. "By dealing directly with such problems as kickbacks, *unearned fees*, and unreasonable escrow account

requirements, the Committee believes that S. 3164 will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." *Id.* (emphasis added). While portions of the legislative history indicate that Congress was *also* very concerned with kickbacks and referral fees, *see* Pet. App. 11a n.9, nothing in the legislative history indicates that these were Congress's *exclusive* concerns, as confirmed by the Senate Report's numerous references to "unearned fees." Nor is there any indication that Congress intended to limit the prohibition on unearned fees by permitting brokers and lenders to charge unearned fees so long as those fees are undivided, as the Fifth Circuit's interpretation would allow.

4. Section 2607(b) should be interpreted to effectuate RESPA's core purpose of protecting consumers from "unnecessarily high settlement charges" caused by "abusive practices." 12 U.S.C. § 2601(a). Charging unearned fees is unquestionably an abusive practice that inflates borrowers' settlement costs, and is therefore precisely the type of misconduct that RESPA was intended to prevent. As petitioners' case below demonstrates, these fees can run into the thousands of dollars and are a direct, uncompensated loss to the consumer. To carve out a loophole whereby brokers and lenders can charge unearned fees so long as they keep those fees entirely for themselves makes no sense, as the harm to consumers is the same regardless of whether an unearned fee is divided. In the absence of clear and unambiguous language to the

contrary, § 2607(b) should not be interpreted to create such a loophole, which would directly undermine RESPA's core consumer-protection objectives. *See* Statement of Policy, 66 Fed. Reg. at 53058 (to require an unearned fee to be divided to violate § 2607(b) would constitute "an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers").

B. To the Extent § 2607(b) Is Ambiguous, HUD's Interpretation Is Entitled to *Chevron* Deference.

To the extent that § 2607(b) is ambiguous with respect to whether an unearned fee must be divided with a third party to be actionable, the Court should accord *Chevron* deference to HUD's regulation and statement of policy interpreting § 2607(b) to prohibit all unearned fees, whether divided or not. *See Chevron*, 467 U.S. at 842-43.

"[I]f the statute speaks clearly 'to the precise question at issue,'" the Court "'must give effect to the unambiguously expressed intent of Congress.'" *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (quoting *Chevron*, 467 U.S. at 842-43). "If, however, the statute 'is silent or ambiguous with respect to the specific issue,'" the Court "must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." *Id.* at 218 (quoting *Chevron*, 467 U.S. at 843). This Court has held that "administrative implementation of a particular statutory provision

qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Here, Congress authorized the Secretary of HUD "to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a). Pursuant to that authorization, HUD has issued at least two interpretations of § 2607(b) that are entitled to *Chevron* deference.

First, in 1992 HUD enacted through formal notice-and-comment rulemaking a regulation interpreting § 2607(b) to prohibit all unearned fees, regardless of whether they are divided:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of the services splits the fee.

24 C.F.R. § 3500.14(c). This formal "legislative regulation[ ]," enacted pursuant to "an express delegation of authority" from Congress, is entitled to "controlling weight unless [it is] arbitrary, capricious, or

manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

Second, in 2001 HUD issued a Statement of Policy reiterating its longstanding interpretation of § 2607(b) "to prohibit settlement service providers from charging unearned fees," including where "one settlement service provider charges the consumer a fee where no nominal, or duplicative work is done." Statement of Policy, 66 Fed. Reg. at 53053. HUD emphasized that it "specifically interprets [§ 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated." *Id.* at 53057. And HUD also noted that this interpretation is "longstanding" and has been "consistently" held "[s]ince RESPA was enacted," *id.* at 53053, citing a HUD Settlement Costs Booklet with this interpretation that was issued in 1976. *Id.* at 53057 (citing 41 Fed. Reg. 20289 (May 17, 1976)).

While HUD's Statement of Policy was not issued through formal notice-and-comment rulemaking, such formality is not required where other factors demonstrate that *Chevron* deference is appropriate. *See Barnhart*, 535 U.S. at 221-22 (holding that formal notice-and-comment rulemaking is not required and applying *Chevron* deference despite its absence); *Mead*, 533 U.S. at 230-31. Here, *Chevron* deference to HUD's Statement of Policy is appropriate for several reasons. First, such deference is appropriate when "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *Mead*, 533 U.S. at 229, and here Congress expressly

authorized HUD to issue not just regulations, but also "*interpretations* . . . as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a) (emphasis added); *see also* 24 C.F.R. § 3500.4(a)(1)(ii) (any document "that is published in the Federal Register by the Secretary and states that it is an 'interpretation,' . . . or a 'statement of policy'" constitutes a "rule, regulation or interpretation" for purposes of § 2617(a)). Second, HUD's interpretation is entitled to "particular deference" because of its "'longstanding' duration" dating back to shortly after RESPA was enacted. *Barnhart*, 535 U.S. at 220. Finally, *Chevron* deference is appropriate here because of the "interstitial nature of the legal question," the "related expertise" of HUD, the "importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222.

Moreover, HUD's Statement of Policy is additionally entitled to *Auer* deference to the extent that it interprets 24 C.F.R. § 3500.14(c), which is HUD's own regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation").

Because HUD's interpretation is consistent with the statutory language and will protect consumers as intended by Congress, it is binding on the courts and directs reversal of the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Dated: December 2, 2011

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AMICUS CURIAE BRIEF

No. 10-1042

IN THE
Supreme Court of the United States

TAMMY FORET FREEMAN, ET AL.,
Petitioners,

v.

QUICKEN LOANS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

This case raises an issue of fundamental importance to *Amicus* the National Association of REALTORS® ("NAR")[2] and its members. It concerns whether Congress, in the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601-2617, authorized government regulators and lay juries to review the reasonableness of charges for real estate settlement services.

Congress passed RESPA out of concern that "certain abusive practices" that had developed "in some areas of the country" were leading to "unnecessarily high" prices for services rendered in connection with the settlement process for residential real estate transactions. 12 U.S.C. § 2601(a).[3] In the years preceding RESPA's enactment, Congress considered, but did not pass, bills that would have authorized direct federal regulation of charges for settlement services. Instead, Congress sought to promote competition for settlement services by requiring "more effective

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* also represents that all parties have consented to the filing of this brief. Counsel for petitioners and respondent have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

[3] "Settlement services," for purposes of RESPA, encompass "any service provided in connection with a real estate settlement," including "services rendered by a real estate agent or broker." 12 U.S.C. § 2602(3).

advance disclosure to home buyers and sellers of settlement costs" and prohibiting those "abusive practices" – i.e., "kickbacks or referral fees" – that were thought to lead to "unnecessarily high settlement charges." *Id.* § 2601(a), (b)(1)-(2).

Despite Congress's rejection of proposed bills to authorize regulation of charges for settlement services, petitioners (supported by the government) ask this Court to interpret RESPA § 8(b) to achieve the very result Congress rejected. As explained further below, the court of appeals correctly found the interpretation of § 8(b) advanced by petitioners and the Department of Housing and Urban Development ("HUD") to be unpersuasive because it cannot be reconciled with the text or history of that provision.

Furthermore, adopting petitioners' and HUD's position that RESPA regulates charges paid by consumers for settlement services would upset the settled expectations of settlement-service providers, including NAR's members, formed over decades since RESPA's enactment. Those concerns are not hypothetical: interpreting RESPA § 8(b) to apply to charges received from consumers, several lower courts have held that real estate brokerages violated that provision by charging a total commission package that included a traditional percentage of the sale price and a fixed amount paid by the buyers. Even where there is undisputed evidence that the buyers received both advance disclosure of the compensation package and substantial services from the brokerages, those courts have held that the fixed component of the commission violates § 8(b), absent proof (satisfactory to the judge) of a sufficient "connection" to "new" services provided by the brokerage. Applying RESPA in that manner not only transforms the

statute into a rate-regulation scheme, but also functionally prevents real estate brokerages from modifying their compensation arrangements in response to rising costs and increased competition. The Fifth Circuit's interpretation of RESPA, by contrast, avoids those practical problems by limiting § 8(b) to its intended application: prohibiting abusive fee-sharing among providers of settlement services.

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,400 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real estate professionals and real property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair lending practices, equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Sackett v. EPA*, No. 10-1062 (argued Jan. 9, 2012); *First American Financial Corp.*

v. Edwards, No. 10-708 (argued Nov. 28, 2011); *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009); *Glenmont Hills Associates Privacy World at Glenmont Metro Centre v. Montgomery County*, 553 U.S. 1102 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

SUMMARY OF ARGUMENT

RESPA § 8(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b). The Fifth Circuit held that § 8(b) does not regulate charges paid by consumers for settlement services. Rather, the court properly interpreted that language to prohibit a provider of settlement services from giving part of a charge received from a consumer to another person "other than for services actually performed." Petitioners (and the government) argue that a plaintiff can state a claim against a settlement-service provider under § 8(b) by alleging that the provider did not perform *sufficient* services in exchange for some "portion, split, or percentage" of the charge paid by the consumer to that provider. That reading of § 8(b) transforms the provision from a restriction

on abusive fee-sharing by settlement-service providers into a vehicle to regulate directly charges for settlement services. RESPA's text and history, as well as the consequences of petitioners' and the government's interpretation, demonstrate that the court of appeals properly rejected petitioners' position.

A. Three features of § 8(b)'s text make clear that it does not regulate charges paid by consumers for settlement services.

First, the statute describes two different exchanges – a payment of a charge by a consumer to a settlement-service provider, and a division of that charge by the provider and another person. The "charge" paid by the consumer is "made or received" by the provider. 12 U.S.C. § 2607(b). Then, the provider "give[s]," and another person "accept[s]," a "portion, split, or percentage" of that "charge." *Id.* Section 8(b) prohibits only the latter exchange (and only when the part of the charge is given and accepted "other than for services actually performed"). The statute does not prohibit the "ma[king]" or "receiv[ing]" of the charge by the provider of settlement services.

Second, in common usage, the words "give" and "accept" entail an exchange between two persons. To say one "accepts" something ordinarily means that another has given that thing to the person. Section 8(b)'s language comports with that ordinary usage: it makes both the settlement-service provider that "give[s]" the unearned part of the charge and the provider that "accept[s]" that part liable for civil and criminal penalties. *Id.*; *see id.* § 2607(d)(1)-(2). Under petitioners' and HUD's interpretation, however, the consumer "give[s]" the part of the charge and a provider "accept[s]" it. That reading makes the consum-

er – the alleged victim of the offense – a violator of the statute and (at least theoretically) subject to severe civil and criminal sanctions. Petitioners and HUD provide no basis for concluding that Congress intended such an absurd circumstance.

Third, § 8(b) applies only to the giving and accepting of a "portion, split, or percentage" of a charge for a settlement service. *Id.* § 2607(b). The ordinary meaning of each of those words refers to a part of something, not the whole. That fact reinforces the conclusion that § 8(b) was intended to apply when settlement-service providers share a charge, not when a consumer pays a charge to a provider. Although petitioners and the government identify isolated, unrelated contexts in which the words "portion" and "percentage" could be taken to refer to the whole of something, those unusual usages do not suggest that "portion" or "percentage" carry anything other than their ordinary meanings in § 8(b) – particularly given that they appear alongside the word "split," which all agree refers to less than a whole.

B. RESPA's legislative history confirms the conclusion that § 8(b) applies only to fee-sharing by settlement-service providers. The drafting history of that provision shows that it originated as a prohibition on attorneys accepting commissions from title insurance companies. The provision was revised to apply not only to those who give such commissions but also to those who accept them. It was also broadened to cover all providers of settlement services, not just attorneys and title insurers. But the history contains no suggestion that those changes were intended to make the provision applicable to prices charged by settlement-service providers to consumers. On the contrary, the Senate committee report

explained that § 8(b) "prohibits *a person or company that renders a settlement service* from giving or rebating any portion of the charge to any other person except in return for services actually performed." S. Rep. No. 93-866, at 6 (1974) (emphasis added); *accord* H.R. Rep. No. 93-1177, at 7 (1974).

C. The court of appeals' interpretation of § 8(b) is also confirmed by the fact that Congress considered and rejected legislation that would have regulated charges paid by consumers. In the years preceding RESPA's enactment, Congress considered a number of different bills designed to address the perception that charges for some settlement services were "unnecessarily high" in certain areas of the country. 12 U.S.C. § 2601(a). One approach, championed by certain legislators, would have authorized HUD to regulate directly the prices charged for settlement services by setting maximum rates – or "caps" – for those services. But Congress rejected that approach and instead enacted legislation that sought to address the costs of settlement services by regulating "certain abusive practices that ha[d] developed in some areas of the country" – specifically, "kickbacks or referral fees." *Id.* § 2601(a), (b)(2). Therefore, petitioners' and the government's reading of § 8(b) – which makes that provision applicable to charges paid by consumers to settlement-service providers – violates the venerable principle that "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted).

Petitioners – but not the government – protest that their position does not make RESPA a price-control statute because, here, the allegation is that the

provider rendered *no* services in return for the fee at issue. In their view, such a claim is permissible so long as it does not ask a court to determine whether a particular charge was reasonable in relation to the services performed. But, on petitioners' construction of the statute, nothing restricts plaintiffs from bringing claims alleging that a particular charge is unreasonable; nor would HUD be prohibited from regulating the reasonableness of those charges. Put differently, a claim that no services were provided in return for a charge necessarily entails judicial inquiry into the reasonableness of that charge – a role that Congress did not intend for courts to play. Indeed, HUD has elsewhere acknowledged that interpreting § 8(b) to reach charges paid by consumers to providers of settlement services means that "[a] single service provider . . . may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided." Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,059 (Oct. 18, 2001).

D. Petitioners' and the government's interpretation of the statute also would create significant practical problems for providers of settlement services, including NAR's members. Although providers have long been entitled to rely on Congress's considered decision in RESPA not to regulate directly charges for settlement services, petitioners' and the government's position would subject providers to onerous new litigation and regulatory burdens. In the place of Congress's preferred check on charges for settlement services – namely, market forces (supplemented by disclosure requirements and prohibitions on kickbacks and referral fees) – petitioners and the

government would substitute review of those charges by judges, juries, and government regulators.

The adverse practical consequences of petitioners' and the government's approach are already being felt by the industry. In recent years, multiple courts have held that real estate brokerages violated § 8(b) by charging a commission that included as one component a fixed amount paid by the buyer. For example, even in the face of undisputed evidence that a brokerage provided substantial services to the buyers, and that those buyers received advance disclosure of the brokerage's compensation arrangement, one court has held that the brokerage violated § 8(b) – making it potentially liable to a large consumer class for treble damages and attorneys' fees – because the court found no "specific" service tied to the fixed component. The court of appeals' interpretation of § 8(b) avoids such results, by respecting Congress's decision not to regulate directly charges to consumers for settlement services.[4]

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[4] As explained below, employing "traditional tools of statutory construction" (*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)) reveals that Congress did not intend RESPA § 8(b) to regulate charges paid by consumers to providers of settlement services. There is accordingly no basis to defer to any contrary interpretation of HUD. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" and listing "the text, structure, purpose, and history" as sources of congressional intent); *see also Chevron*, 467 U.S. at 862-63 (considering legislative history before agency interpretation). In any event, as respondent correctly explains, HUD's interpretations lack the force of law and therefore are not entitled to deference. Those interpretations also are unpersuasive. *See* Resp. Br. 43-59.

ARGUMENT

RESPA § 8(b) APPLIES ONLY WHEN TWO OR MORE PERSONS DIVIDE A CHARGE PAID BY A CONSUMER

A. The Text Of RESPA § 8(b) Covers Sharing A Part Of A Charge, Not Paying The Whole Of One

1. The interpretation of RESPA "begin[s], as in any case of statutory interpretation, with the language of the statute." *E.g.*, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011). RESPA § 8(b) provides in pertinent part that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b). That "statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort[,] collects it, and then either splits it with *C* or gives *C* a portion or percentage . . . of it." *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (Posner, J.). Three main reasons confirm that interpretation.

First, § 8(b) prohibits "giv[ing]" and "accept[ing]" a "portion, split, or percentage" of a "charge made or received for the rendering of a real estate settlement service." 12 U.S.C. § 2607(b). Those words describe two distinct exchanges: First, a "charge" is "made or received" from the consumer by a person who has rendered a settlement service. *Id.* Second, the provider that received the charge from the consumer "give[s]," and another person "accept[s]," a "portion, split, or percentage" of that "charge." *Id.* If, as petitioners contend, the statute applied to payments by consumers to settlement-service providers, there

would have been no reason for Congress to use different sets of verbs to describe the consumer-provider transaction ("made or received"), on the one hand, and the fee-sharing transaction ("give and . . . accept"), on the other hand.

Second, by its plain terms, § 8(b) requires at least two persons to commit a violation – one to "give" and another to "accept" a portion, split, or percentage of a charge for settlement services. In common usage, one can be said to "give" something only if another accepts it; likewise, to say that one "accepts" something means that it has been given to that person by another.[5] Thus, for a person to violate § 8(b) by accepting a portion, split, or percentage of a charge, there must be another person who also violates the statute by giving the first person the portion, split, or percentage. As the court of appeals explained, "the provision requires two parties each committing an act: one party gives a 'portion, split, or percentage,' and another party receives a 'portion, split, or percentage.'" Pet. App. 7a.

Although petitioners and the government do not dispute that it takes two to make a violation of § 8(b), they argue that, in cases (such as this one) in which the settlement-service provider did not divide the charge with another person, the consumer is the person who "give[s]" a portion, split, or percentage

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[5] *See Webster's New Int'l Dictionary* 1060 (2d ed. 1952) ("*Webster's Second*") (defining "give" as "[t]o deliver or transfer (to another something that is taken by him)"); *id.* at 14 (defining "accept" as "[t]o receive (a thing offered to or thrust upon one) with a consenting mind"); *Webster's Third New Int'l Dictionary* 959 (2002) ("*Webster's Third*") (defining "give" as "to confer the ownership of without receiving a return" or "to put into the possession of another for his use"); *id.* at 10 (defining "accept" as "to receive with consent (something given or offered)").

of the charge. *See* Pet. Br. 21; Gov't Br. 14. But adopting that interpretation would have the absurd consequence of making the alleged victim of the offense a violator of the statute. *See Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 265 (4th Cir. 2002) ("It would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees."); *see also Krzalic*, 314 F.3d at 879. By contrast, the court of appeals' reading of the text – i.e., that it regulates the sharing of charges among providers of settlement services, not the reasonableness of charges paid by consumers – avoids that absurdity. *See, e.g., United States v. Granderson*, 511 U.S. 39, 56 (1994) (Court adopts interpretation that "avoids attributing to the legislature either 'an unjust or an absurd conclusion'") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989); *id.* at 527 (Scalia, J., concurring in the judgment).

Petitioners concede that "[i]t would make no sense to construe the statute to render a consumer liable to herself under a statute expressly enacted for the protection of consumers." Pet. Br. 21 n.16. But that is exactly what their interpretation of the statute requires. RESPA § 8(d) provides that "[a]ny person or persons who violate" § 8(b) "shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). Thus, under petitioners' and the government's interpretation of the statute, petitioners are liable to themselves for treble damages because they both "g[a]ve" the fee at issue to respondent (and

thus violated § 8(b)) and were "charged for the settlement service involved in the violation" (and thus are entitled to seek treble damages under § 8(d)(2)).[6]

Petitioners maintain that consumers are unlikely to be held liable for damages under § 8(d)(2) "'because a consumer will always intend to pay the fee for services that are actually performed.'" Pet. Br. 21 n.16 (quoting *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003)); *see also* 66 Fed. Reg. at 53,059 n.6. But even if petitioners are correct that consumers are unlikely to face damages judgments under § 8(d)(2) – or criminal liability under § 8(d)(1)[7] – that would not change the fact that their interpretation makes the victim a violator of the statute in many cases. Indeed, according to petitioners, the paradigmatic violation of § 8(b) involves a consumer "giv[ing]" an "unearned fee[]" to a settlement-service provider. Pet. Br. 24; *accord* Gov't Br. 16-17. Petitioners identify no other statute under which a victim is considered a violator in the usual case; nor do they offer any reason to conclude that Congress would have intended such a "perverse"

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[6] The government asserts that § 8(d) supports the conclusion that a single service provider can violate § 8(b) when it accepts a charge from a consumer because that provision establishes penalties for "[a]ny *person* or persons" who violate § 8. 12 U.S.C. § 2607(d)(1), (2) (emphasis added). But the reference to any "person" indicates only that each violator of the statute is subject to joint and several liability for damages (or criminal sanctions). If the statute had said only that the "persons" who violate § 8 are liable for penalties, it could have been read to require a plaintiff to join both the giver and the acceptor of the part of the charge in an action under § 8(d).

[7] HUD has said only that it would be "unlikely" to initiate an enforcement action against a consumer under § 8(b). *See* 66 Fed. Reg. at 53,059 n.6.

result under RESPA. *Boulware*, 291 F.3d at 265. Reading § 8(b) to apply only when one settlement-service provider divides a charge with another provider – and not when a consumer pays a charge to a provider – makes sense of the statutory scheme and avoids attributing to Congress an illogical intent. *See id.* (concluding that "it is insufficient for HUD to proclaim that the statute will not be enforced against consumers" because the court will not "interpret § 8(b) so as to compel the absurd conclusion that Congress drafted it to apply to consumers in the first place").

Third, § 8(b)'s requirement that the violator have given or accepted a "portion, split, or percentage" of a charge for settlement services, 12 U.S.C. § 2607(b), reinforces the conclusion that Congress intended to regulate fee-sharing. The ordinary meaning of each of those terms refers to less than the whole of something.[8] Section 8(b) therefore applies to circumstances in which a provider of settlement services gives a part of a charge to another person, even though that person performed no services in return for its share. The provision does not apply when a

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[8] *See Webster's Second* at 1924 (defining "portion" as "[a]n allotted part; a share; a parcel; a division in a distribution[;] . . . [a] part of a whole"); *Webster's Third* at 1768 (defining "portion" as "an individual's part or share of something"); *Webster's Second* at 2432 (defining "split" as a "[s]hare, as in a division of booty"); *Webster's Third* at 2202 (defining "split" as "a share (as of booty, winnings, profits) claimed or promised"); *Webster's Second* at 1815 (defining "percentage" as "[a] certain rate per cent; the allowance, duty, rate or interest, discount, or commission, on a hundred; a part or proportion of a whole expressed as so much or many per hundred"); *Webster's Third* at 1675 (defining "percentage" as "a part of a whole expressed in hundredths[;] . . . a share of winnings or profits : COMMISSION, CUT"); *see also* Pet. App. 9a; *Boulware*, 291 F.3d at 265.

consumer pays the whole of a charge to a settlement-service provider, because the provider has not "accept[ed]" a "portion, split, or percentage" of that charge.

The fact that there may be other contexts in which "percentage" could include 100 percent, or a prohibition on embezzling "any portion" of a fund could include the whole, *see* Pet. Br. 17-18; Gov't Br. 18, does not suggest that those terms have anything other than their ordinary meanings in RESPA § 8(b). In fact, the placement of those words together with the term "split" – which all agree cannot refer to a whole – reinforces the conclusion that Congress intended to proscribe the sharing of a part, not the payment of a whole. *See* Pet. App. 9a-10a; *Chevron*, 467 U.S. at 861 ("the words associated with [a term] may indicate that the true meaning of the series is to convey a common idea"); *see also, e.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011) ("[I]n all statutory construction cases, we begin with 'the language itself *[and] the specific context in which that language is used*.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (emphasis added; second alteration in original).[9]

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[9] Petitioners' reliance on the use of "any" before the phrase "portion, split, or percentage" in § 8(b), Pet. Br. 18-19, is misplaced because the pertinent question is whether or not the whole of a charge can be considered a "portion, split, or percentage" of a charge. If, as the court of appeals held, those words refer only to a part of a charge, then the fact that Congress prohibited giving or accepting "any" part of a charge provides no support for petitioners' interpretation. *Cf. Small v. United States*, 544 U.S. 385, 388 (2005) ("[E]ven though the word 'any' demands a broad interpretation, we must look beyond that word itself.") (collecting cases; citation omitted).

Nor does reading "portion, split, or percentage" to refer to a part, rather than the whole, of a charge render the words "portion" and "percentage" "entirely without effect," as petitioners contend, Pet. Br. 20. As the Seventh Circuit explained, "portion" or "percentage" refers to a share "other than 50 percent – the situation that the statutory term 'split' most naturally describes." *Krzalic*, 314 F.3d at 879. Thus, the phrase "portion, split, or percentage of any charge" demonstrates Congress's intent broadly to capture all arrangements in which one settlement-service provider divides a charge with another person; it does not indicate that Congress sought to prohibit the payment of the charge itself.

2. Petitioners concede that, under the court of appeals' interpretation, § 8(a) and § 8(b) "perform[] some independent function" and that their reading "leaves some overlap" between those two provisions. Pet. Br. 24. They nevertheless argue that § 8(b) must be construed to apply to payments of charges by consumers, lest it be rendered "largely surplusage" in light of the prohibition on kickbacks in § 8(a). *Id.* That contention has no merit.

Section 8(a) prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service . . . shall be referred to any person." 12 U.S.C. § 2607(a). That provision is both broader and narrower than § 8(b). It broadly prohibits the transfer of any "thing of value," *id.*, which RESPA expansively defines to "include[] any payment, advance, funds, loan, service, or other consideration," *id.* § 2602(2). Section 8(b), by contrast, prohibits only the exchange of part of a "charge" for

settlement services, and it requires a showing that the part of the charge was given and accepted "other than for services actually performed." *Id.* § 2607(b).

Section 8(a) is also narrower than § 8(b), however, because it requires proof of an "agreement or understanding" that settlement-service business "shall be referred" in exchange for the kickback. *Id.* § 2607(a). Subsection (b) contains no such requirement and instead prohibits any division of a charge where the recipient performs no services in return for the part of the charge it accepts.

Thus, in § 8(a), Congress broadly prohibited referral arrangements in which one settlement-service provider pays any form of kickback (any "thing of value") in return for an "agreement or understanding" that settlement-service business will be referred to it. Section 8(b) performs the distinct function of barring settlement-service providers from dividing charges paid by consumers, even where no agreement or understanding regarding the referral of business can be proved. To avoid criminalizing "[r]easonable payments in return for services actually performed or goods actually furnished," which Congress did not "intend[] to be prohibited," S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7, § 8(b) includes the additional express requirement, not found in § 8(a), that the plaintiff prove that the payment of a part of the charge was not "for services actually performed," 12 U.S.C. § 2607(b). The two subsections thus perform complementary functions in pursuit of Congress's purpose of "eliminat[ing] . . . kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

B. RESPA's Legislative History Confirms That § 8(b) Does Not Reach Undivided Charges

RESPA's legislative history "makes clear" that Congress did not intend to empower courts to review the reasonableness of undivided charges paid by consumers to settlement-service providers. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 n.12 (2010). Section 8(b) originated as a prohibition on title insurance companies paying portions of premiums to attorneys representing parties in real estate transactions. During the legislative process, the provision was broadened to cover other types of settlement services, but the legislative record leaves no doubt that the provision's sole purpose was to regulate fee-sharing among settlement-service providers. Congress sought to bolster the explicit prohibition on kickbacks in § 8(a) by also barring settlement-service providers from sharing parts of charges received from consumers with other providers where the providing accepting the payment performs no services in return – recognizing that providers often made such payments in the hope of obtaining referrals of future business (even in the absence of an actual agreement or understanding to that effect).

In February 1972, Representative Patman introduced a bill that contained both a provision banning kickbacks (similar to what is now § 8(a)) and a provision prohibiting attorneys "who perform[] any legal services which are incident to or a part of any real estate settlement" from "receiv[ing] any commission in connection with the issuance of title insurance for any real property which is a part of such settlement." H.R. 13337, 92d Cong. § 103(a) (1972). Representative Patman's proposal was incorporated into a larger

housing-related bill under consideration by the House Banking Committee. *See* Staff of H. Comm. on Banking & Currency, 92d Cong., Housing and Urban Development Act of 1972, at 56 (Comm. Print 1972) (§ 907). During the committee proceedings, Representative Stephens proposed a substitute bill that included a modified version of Representative Patman's proposal. *See* 118 Cong. Rec. 28,117 (Aug. 14, 1972) (statement of Rep. Stephens). The committee adopted Representative Stephens's substitute and reported a bill containing the following provision under the heading "Prohibition Against Unearned Fees":

> Any person who gives and any person who receives any portion, split, or percentage of any or all charges for title insurance in connection with any real estate settlement involving a federally-related mortgage loan, other than for services actually performed in the issuance of such title insurance, shall be jointly and severally liable to the person or persons charged for the portion, split, or percentage in an amount equal to three times the portion, split, or percentage.

H.R. 16704, 92d Cong. § 907 (1972). Representative Stephens explained that, whereas Representative Patman's proposal was "directed only to 'attorneys,' and cover[ed] only the receipt of [unearned] fees," his substitute "expand[ed] th[e] prohibition to embrace all persons, irrespective of whether they are attorneys or not and irrespective of whether they are on the giving or receiving end of the transaction." 118 Cong. Rec. 28,118 (Aug. 14, 1972). Thus, Representative Stephens's substitute prohibited both the giving and the accepting of an unearned title insurance commission. There is no indication, however, that

the substitute provision was intended to regulate the amount of title insurance premiums paid by consumers.

In 1973, within weeks of each other, members of both the House and the Senate introduced legislation containing language substantively identical to what is now RESPA § 8(b). *See* S. 2228, 93d Cong. § 105(b) (1973); H.R. 9989, 93d Cong. § 106(b) (1973). Representative Stephens, the lead sponsor of the House bill, explained that "the provision prohibiting unearned fees of last year's bill has been expanded to cover all persons who render settlement services." *Real Estate Settlement Costs: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 93d Cong. 49 (1973) (statement of Rep. Stephens). While the Senate bill was under consideration by the Senate Banking Committee, Senator Brock, the sponsor of that legislation, introduced another bill containing certain additional provisions not found in S. 2228, but preserving the prohibition on fee-sharing without change. *See* S. 3164, 93d Cong. § 7(b) (1974). He described that provision as "prohibit[ing] any fee-splitting among persons who render settlement services unless the fee is paid in return for services actually rendered." 120 Cong. Rec. 6,586 (Mar. 13, 1974); *accord id.* at 23,551 (July 16, 1974) (statement of Sen. Brock).

The committee reports on the Senate and House bills confirmed that the purpose of the provision was to prohibit fee-sharing among settlement-service providers where the recipient of the share provided no services in return for its portion of the charge. The Senate Banking Committee's report described the provisions now known as RESPA § 8(a) and § 8(b) as follows:

> Section [8] is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished for the referral of real estate settlement business. *The section also prohibits* ***a person or company that renders a settlement service*** *from giving or rebating any portion of the charge to any other person except in return for services actually performed.* Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.

S. Rep. No. 93-866, at 6 (emphases added); *accord* H.R. Rep. No. 93-1177, at 7. The report thus made clear that the provision targets payments by "a person or company that renders a settlement service" – not payments by consumers to providers.

The Senate report described in detail the arrangements that RESPA § 8 was designed to prohibit. It stated that the legislation targeted "the payment of referral fees, kickbacks, rebates and unearned commissions" paid by providers of settlement services "as inducements to those persons who are in a position to refer settlement business." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. The report provided examples of prohibited arrangements, all of which involved payments by one settlement-service provider to another. It explained that "a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. Or "a 'commission' may be paid by a title insurance company to a corporation that is wholly-owned by one or more

savings and loan associations, even though that corporation performs no substantial services on behalf of the title insurance company." S. Rep. No. 93-866, at 6; *accord* H.R. Rep. No. 93-1177, at 7. In both of those examples, one settlement-service provider shares part of a charge received from a consumer with another provider that performed no services in return for the payment. Nothing in either committee report suggested that the provision that became § 8(b) was intended to regulate charges paid by consumers.[10]

During debate on the House floor, Representative Blackburn, a co-sponsor of the House bill, was asked whether the language now in § 8(b) would permit an action against a settlement-service provider if the provider's charges were not reasonably related to the value of the services rendered. *See* 120 Cong. Rec. 28,263 (Aug. 14, 1974). Although Representative Blackburn indicated uncertainty, he replied that he "hope[d] that would not be the case." *Id.* Less than a week later, Representative Blackburn supplemented his response, making clear that the text of § 8(b) "would not authorize" a "civil suit brought by a homebuyer who believed that the charge made to him by" a provider of settlement services "was in excess of the reasonable value of the services rendered." *Id.* at 29,442 (Aug. 20, 1974). He explained that, "[w]hen [§ 8(b)] says that no person shall give a portion of

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[10] In seeking to find support in RESPA's legislative history for interpreting § 8(b) to regulate charges paid by consumers, the government points to references to "unearned fees." Gov't Br. 22-23. But those statements refer to "unearned fees" paid by one settlement-service provider to another – not allegedly "unearned fees" paid by consumers to settlement-service providers. *See* S. Rep. No. 93-866, at 6; H.R. Rep. No. 93-1177, at 7.

the fee to anyone else except for services actually performed, it is clear that the word 'person' does not refer to the homebuyer or seller himself who is purchasing a settlement service." *Id.* Otherwise, he continued, "the homebuyer or seller might be liable for the criminal and civil penalties provided in subsection (d)." *Id.* Representative Blackburn thus concluded that § 8(b) "was intended to deal only with fee-splitting arrangements among participants in the settlement process, whereby an attorney, title company, lender or other person who provides a settlement service might give a portion, split or percentage of the fee he receives to someone else even though the person who gets the portion, split or percentage has not done any legitimate work." *Id.*[11]

The legislative record thus confirms overwhelmingly that Congress's intention in enacting § 8(b) was to regulate fee-sharing among settlement-service providers, not charges paid by consumers.

C. Petitioners' Interpretation Would Make RESPA A Price-Control Statute, An Approach Congress Considered And Rejected

Petitioners' interpretation of RESPA § 8(b) is incorrect for the additional reason that it would empower not only lay juries but also HUD to regulate charges paid for settlement services. The legislative

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[11] Although those remarks were published in the Congressional Record after the House passed its version of RESPA, the House and Senate bills subsequently went to a conference committee to resolve differences among them. When the House voted to approve the resulting conference bill in December 1974, *see* 120 Cong. Rec. 39,129 (Dec. 11, 1974), its members had the benefit of Representative Blackburn's explanation that the language of § 8(b) applies only to fee-sharing among providers of settlement services.

record is clear that Congress considered and rejected proposals to enact a price-control scheme for settlement services.

In the years preceding RESPA's enactment, Congress considered numerous proposals that would have authorized HUD to set maximum charges for settlement services. *See, e.g.*, S. 3248, 92d Cong. § 712(a) (1972) (directing HUD to "publish standards governing the amounts of closing costs allowable to be paid by buyers and sellers"); S. 2288, 93d Cong. § 4(a)(1) (1973) (directing HUD to "establish the maximum amounts of the charges to be imposed upon the borrower and seller for services incident to or a part of a real estate settlement" and providing that those "maximum amounts . . . shall be designed to reflect the reasonable charges for necessary services . . . and to assure that settlement costs do not exceed such reasonable charges"); H.R. 11183, 93d Cong. § 4(a)(1) (1973) (same); H.R. 12066, 93d Cong. § 4(a)(1) (1973) (same); *see also* S. 2775, 92d Cong. § 5 (1971) (authorizing HUD to "establish standards for determining effective premium rates" for title insurance). In 1972, one of those proposals – S. 3248 – passed the Senate, but not the House.

Those proposals provoked substantial debate in Congress. Ultimately, both chambers rejected those rate-regulation proposals in favor of legislation that regulated particular "abusive" practices by settlement-service providers – namely, kickbacks and fee-sharing. As the Senate committee report on RESPA explained:

> [T]here are two basic approaches that can be taken in solving the problems of settlement costs. One approach is to regulate closing costs directly, that is to provide for legal maxima on the charges

> which may be imposed for services incident to real estate settlements. This approach is the one take in S. 2288. The second approach is to regulate the underlying business relationships and procedures of which the costs are a function. This is the approach employed in S. 3164 adopted by the Committee.

S. Rep. No. 93-866, at 3; *accord* H.R. Rep. No. 93-1177, at 4. Thus, as multiple courts of appeals have recognized, "Congress considered and explicitly rejected a system of price control for fees"; instead, it "directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets – the splitting and kicking back of fees to parties who did nothing in return for the portions they received." *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) (Easterbrook, J.); *accord Boulware*, 291 F.3d at 268.

As this Court consistently has observed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS*, 480 U.S. at 442-43 (internal quotation marks omitted); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001). But that is exactly the result of petitioners' construction of § 8(b). Under petitioners' interpretation, a private plaintiff or regulator can bring an action under § 8(d) alleging that a settlement-service provider "accept[ed]" from a consumer "a 'portion, split, or percentage' of a settlement service charge . . . 'other than for services actually performed.'" Pet. Br. 16-17. Thus, petitioners' interpretation would permit judicial review (and HUD regulation) of whether charges paid by consumers

bear a sufficient connection (in the court's or regulator's eyes) to settlement services performed by the provider.

Although petitioners observe that the allegation in this case is that the *entire* charge was other than for services actually performed, *see id.* at 28, nothing in their reading of the statute would prevent a claim that *part* of the charge was "unearned." Indeed, in the HUD policy statement on which petitioners rely, the agency candidly acknowledges that interpreting § 8(b) to reach charges paid by consumers to providers of settlement services means that "[a] single service provider . . . may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided." 66 Fed. Reg. at 53,059. Petitioners and the government thus seek to achieve through administrative and judicial "interpretation" a result that Congress rejected during the legislative process.

Petitioners argue that § 8(b) should be interpreted to regulate charges paid by consumers to settlement-service providers because Congress found in RESPA that "reforms" are necessary to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a); *see* Pet. Br. 25-27. But "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Here, there is no dispute that RESPA was intended to limit "unnecessarily high settlement charges." Congress sought to achieve that goal, however, not by "regulat[ing] closing costs directly" (as petitioners'

approach would do), but by "regulat[ing] the underlying business relationships and procedures of which the costs are a function" – i.e., "kickbacks" and "unearned fees" paid by one provider to another. S. Rep. No. 93-866, at 3; *accord* H.R. Rep. No. 93-1177, at 4. Petitioners cannot rely on vague notions of legislative purpose to resurrect a statutory means – regulation of the reasonableness of charges for settlement services – that Congress rejected. *See also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs[,] . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").[12]

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[12] Moreover, the government's hyperbolic claim that, if § 8(b) is not interpreted to regulate charges paid by consumers, then "the kinds and amounts of unearned fees that a lender (or other settlement service provider) could charge a consumer would be limited only by the lender's creativity," Gov't Br. 20, ignores the role that state statutory and common law plays in prohibiting fraudulent practices by settlement-service providers. In addition, the concerns raised in the States' *amicus* brief (Br. 9, 16-19) regarding inadequate disclosure of charges are not only misplaced (because this case is about whether charges can be made at all, not whether they must be disclosed) but also unfounded (because they rely on studies that pre-date recent amendments to HUD's disclosure regulations, *see* Final Rule, Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68,204 (Nov. 17, 2008)).

D. Petitioners' Interpretation Would Upset The Settled Expectations Of Providers Of Settlement Services And Create Significant Practical Problems For The Settlement-Service Industry

Providers of settlement services, including NAR's members, have been entitled for decades to rely on Congress's decision to reject versions of RESPA that would have authorized direct federal regulation of charges for settlement services. Adopting petitioners' view that § 8(b) applies to charges paid by consumers to settlement-service providers would, however, upset the settled understanding that RESPA is not a price-control statute by authorizing plaintiffs (both public and private) to bring actions alleging that charges paid by consumers are "unearned" (in whole or in part). The result would be to substitute administrative and judicial regulation for Congress's preferred approach, which was to rely on market forces – bolstered by improved disclosure and prohibitions on abusive practices – to constrain charges for settlement services.

In addition, authorizing suits such as petitioners' leads to harsh and irrational consequences for providers of settlement services. Indeed, such consequences are already being felt. Relying in part on the assertion in HUD's 2001 policy statement that § 8(b) regulates charges paid by consumers, *see* 66 Fed. Reg. at 53,058-59, private plaintiffs have in recent years pursued class actions against settlement-service providers, alleging that those providers violated § 8(b) by receiving compensation without performing sufficient services in return. In a number of cases, courts have allowed such claims to proceed not only to discovery but also to trial.

In one recent decision, for example, a court held that "[a] rational jury could find that" the defendant mortgage lender violated § 8(b) by receiving compensation that (according to the plaintiff) "was not in fact charged 'for' services," but was instead an (apparently unlawful) "overhead charge," or an amount that was otherwise insufficiently "[]connected to compensable settlement services." *Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330, 340 (E.D.N.Y. 2009).[13] To avoid a trial involving the claims of tens of thousands of consumers – in which it would have had to prove that the particular amount in question bore a judicially sufficient "[]connect[ion]" to "compensable settlement services" – the lender was compelled to agree to a substantial class-action settlement.

NAR's members have faced similar claims. In response to increased competition and rising costs, real estate brokerages have in recent years experimented with innovative compensation structures, including commissions that have a fixed component. Thus, for example, a brokerage may charge a commission that includes a fixed amount, usually on the order of a few hundred dollars, in addition to the traditional percentage of the sale price of the property. That fixed amount is generally disclosed and agreed to by the client or customer, along with the rest of the commission.

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[13] *Cohen* was decided on remand from a decision in which the Second Circuit held, in conflict with the Fourth and Seventh Circuits' decisions in *Boulware* and *Krzalic*, that the plaintiff had stated a valid claim under § 8(b) by alleging that the lender "collected an undivided unearned fee." *Cohen v. J.P. Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007); *see id.* at 115 n.3 (noting the circuit conflict).

Private plaintiffs nevertheless have sued real estate brokerages under RESPA, claiming that the fixed component of their real estate commissions was "other than for services actually performed" and therefore violated § 8(b). Those plaintiffs have sought to recover treble damages and attorneys' fees under § 8(d) on behalf of large consumer classes. Following the approach in *Cohen*, multiple courts have allowed such claims to proceed, threatening brokerages with ruinous class-action liability. *See Augenstein v. Coldwell Banker Real Estate LLC*, No. 2:10-cv-191, 2011 WL 3837096 (S.D. Ohio Aug. 30, 2011) (granting summary judgment for plaintiffs); *Noall v. Howard Hanna Co.*, 750 F. Supp. 2d 833 (N.D. Ohio 2010) (denying defendants' motion to dismiss); *Busby v. JRHBW Realty, Inc.*, 642 F. Supp. 2d 1283, 1294 (N.D. Ala. 2009) (relying on *Cohen* in holding as a matter of law that the brokerage's fixed component was "not settlement-related and/or provide[d] little or no benefit" to the customer and therefore violated § 8(b)).

In *Augenstein*, for example, the brokerage charged a "total commission package" consisting of 3% of the sale price (paid by the sellers of the property) and a fixed amount of $199 (paid by the buyers). 2011 WL 3837096, at *1. That arrangement was disclosed to the buyers in advance, and the record showed that the brokerage had "provided a number of services to" the buyers, including "represent[ing] [them] as buyers' brokers"; "show[ing] them properties and provid[ing] them with information"; "prepar[ing] and present[ing] offers and counteroffers"; and "assist-[ing] with negotiating the Purchase Agreement." *Id.* at *4.

The buyers nevertheless sued the brokerage under RESPA and argued that the brokerage violated § 8(b) when it "accept[ed]" the $199 amount. They alleged that the $199 was "a fee for which no services [were] rendered; and/or . . . a duplicative fee for services already rendered as part of the [3%] total sales/broker's commission." *Id.* at *1. The plaintiffs sought to represent "a nationwide class of similarly situated borrowers" who paid a similar fixed amount to the brokerage. *Id.* at *2.

The district court agreed with the plaintiffs' position and held that the brokerage had violated RESPA § 8(b).[14] Although the court paid lip service to the principle that "RESPA is not a price control statute," it rejected the brokerage's position that the $199 amount was properly considered "part of the total commission." *Id.* at *3. Instead, it held that a provider of settlement services must prove "a direct connection between" any money it collects and "a specific settlement service." *Id.* Despite the (apparently undisputed) evidence that the defendant brokerage performed extensive services in return for its commission package (and that the compensation arrangement was disclosed to the plaintiffs in advance), the court held that the $199 fixed portion of the commission was an unlawful "unearned" fee because it was not "connect[ed] . . . to any specific service." *Id.* at *4. The court emphasized testimony that customers received no "new services" when the brokerage began including the fixed portion. *Id.* at *1. And it reasoned that, "[w]hile [the defendant] can certainly change its fee structure in order to

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[14] Although the district court granted the plaintiffs' motion for summary judgment on liability, further proceedings are pending on their motion for class certification.

increase its profit, it must do so in a manner that is consistent with RESPA." *Id.* at *4.

The *Augenstein* court did not explain how the brokerage could have "change[d] its fee structure . . . consistent with" the court's interpretation of RESPA. *Id.* But the import of the court's reading of the statute is that *any* "new" component of a commission package must bear a sufficient "connection" to the provision of a "new" service for the customer. That construction of RESPA places severe restrictions on the ability of real estate brokerages to adjust their pricing arrangements in response to competition and rising costs.[15]

* * *

There is no basis to think that, in rejecting rate regulation and adopting legislation designed to address abusive kickbacks and referral fees, Congress could have contemplated, let alone intended, the statute to be used to preclude a provider of settlement services from changing its pricing structure or raising its prices. Such results find no support in RESPA's text, and they functionally reverse Congress's considered decision to reject proposed bills that would have made RESPA a rate-regulation statute. The Fifth Circuit's interpretation of § 8(b) avoids the problems presented by decisions such as those discussed above by limiting § 8(b) to its intended role – regulating abusive fee-sharing among providers of settlement services.

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[15] Even an increase in the percentage rate of a traditional sales commission could be attacked under the interpretation adopted in *Augenstein*, on the ground that the brokerage performed no "new services" in return for the higher commission.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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